



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Making and changing laws in ancient Athens

Citation for published version:

Canevaro, M 2015, Making and changing laws in ancient Athens. in M Canevaro & E Harris (eds), *Oxford Handbook of Ancient Greek Law*. Oxford University Press, Oxford.
<https://doi.org/10.1093/oxfordhb/9780199599257.013.4>

Digital Object Identifier (DOI):

[10.1093/oxfordhb/9780199599257.013.4](https://doi.org/10.1093/oxfordhb/9780199599257.013.4)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Oxford Handbook of Ancient Greek Law

Publisher Rights Statement:

This material was originally published in The Oxford Handbook of Ancient Greek Law edited by Edward M. Harris and Mirko Canevaro, and has been reproduced by permission of Oxford University Press
<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199599257.001.0001/oxfordhb-9780199599257-e-4>. For permission to reuse this material, please visit <http://global.oup.com/academic/rights>.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Making and Changing Laws in Ancient Athens

Forthcoming in the *Oxford Handbook of Ancient Greek Law*

Mirko Canevaro (The University of Edinburgh)

Abstract

This chapter explores the development of ideas about legislation and legislative procedures in ancient Athens. It isolates an ideology of legislation that mistrusted legal change, and that came into conflict with democratic ideas and practices. It then discusses the creation of *nomothesia* procedures at the end of the fifth century BCE that reconciled the need for legal change with that for consistent and stable laws, and follows the workings of these procedures throughout the fourth century BCE.

Keywords

Legal change, *nomothesia*, *graphe paranomon*, oligarchic revolutions, Athenian democracy, Solon.

1. Introduction: canon formulas, rules of change and the Athenian democracy

Laws change, are modified and fall out of use as a result of changes in political institutions and social practices. On the other hand, legal systems show a general concern with the consistency and predictability of their laws and of the judicial decisions that are based on those laws. In order to achieve (and to be seen to maintain) consistency and predictability, societies have to ensure a high degree of stability in their laws, or at least a general perception that laws are stable. This is why change, although inevitable, is not immediately recognised in most ancient legal systems.

Change in the law is sometimes denied and sometimes ignored, and legal systems often stress instead the antiquity of their laws, their distinguished origins and the hallowed (if not divine) status of their authors as a way to enhance their authority. Laws change, but not all societies are ready to admit it.

The very reality of legal change *vis-à-vis* the need for stability, as has been recently argued by Giorgio Camassa, becomes an issue for a society only when norms and laws are written down, and the written document preserving outdated statutes can contradict any claims that they are fixed and unchanged, thus undermining their authority (Camassa 2011: *passim*). It is not surprising therefore that the greatest concern of the earliest extant written collections of laws is not securing smooth change when change is needed, but rather denying it and preventing it. One finds evidence for this obsession with stability in societies and legal systems as different as those of the Near East and Greece during the Archaic period. Legislation in the Near East is often in the hands of an autocratic ruler, who is also priest, military leader and judge; the monarch formulates his laws in response to a request of the gods, not of the people; his laws contain no measures that will allow the subjects to hold their rulers accountable. The Greeks, on the other hand, had an absolute mistrust for any form of autocratic power, and their first written laws show great concern with preventing tyranny, avoiding concentration of power and holding accountable anyone in a position of authority. Laws did not come from autocratic rulers, but from lawgivers who were represented as outsiders and did not hold political power (Harris 2006: 6-14). Despite these differences, both Near Eastern and early Greek laws show a striking concern with denying legal change: laws are given once and for all, and are not supposed to be changed.

Notable examples of such concerns are found in the epilogues of the Codes of Lipit Ishtar and Hammurabi. The code of Lipit Ishtar, which can be approximately dated to the years between 1934 and 1924 BCE, ends with the king's statement of the importance of his undertaking, and then proceeds to bless (briefly) whoever will leave his work intact and curse (profusely) whoever will damage, emend or erase the stele:

When I established justice in the lands of Sumer and Akkad, I erected this stela. He who will not do anything evil to it, who will not damage my work, who will <not> efface my inscription and write his own name on it – may he be granted life and breath of long days; may he raise his neck to heaven in the Ekur temple; may the god Enlil's brilliant countenance be turned upon him from above. (But) he who does anything evil to it, who damages my work, who enters the treasure room, who alters its pedestal, who effaces this inscription and writes his own name (in place of mine), or, because of this curse, induces an outsider to remove it - that man, whether he is a king, an enu-lord, or an ensi-ruler (... may he be completely obliterated ...] May [... the god ...], primary son of the god Enlil, not approach; may the seed not enter; ... the mighty one, the seed, ... May he who escapes from the weapon, after he enters (the safety of) his house, may he not have [any heirs]. May [the gods ...], Ashnan, and Sumukan, lords of abundance, [withhold(?) the bounty of heaven and] earth. [...] May [...] the god Enlil [...] revoke the gift of the lofty Ekur temple. May the god Utu, judge of heaven and earth, remove the august word. [...] its foundation bring into his house(?) ... May he make his cities into heaps of ruins. May the foundations of his land not be stable, may it have no king. May the god Ninurta, mighty warrior, son of the god Enlil, [...] (tr. Roth)

A similar passage in the code of Hammurabi (1792-1750 BCE) is even more interesting, because the focus moves from the physical preservation of the stele to that of the laws themselves:

May any king who appears in this land at any time at all in the future heed the righteous commands that I have inscribed on this stone. May no one change the justice for the land which I have ordained and the verdicts for the land which I have rendered. May no one remove my graven image. If he is a man of intelligence, who is able to direct his land aright, let him adhere to the commands I have written on this stela, and let this stela explain to him the customs and traditions, the social problems I have encountered and the decisions I have taken for the community. So then may he direct the mass of humanity aright, let him consider their problems, let him take decisions for them. Let him weed out evil and wickedness from his land, let him improve the condition of his people. I am Hammurabi the king of righteousness, to whom Shamash has entrusted the truth. My words are special. My deeds cannot be surpassed. It is only to the senseless they are meaningless; to the wise they are a cause for praise. If that man has paid attention to the commandments that I have inscribed on this stone and has not cast aside my rules, if he has not changed my commandments or emended what I have written, Shamash will surely make that man's rule last for as long as he has made mine last, the rule of the king of righteousness. He shall feed his flock in pastures of righteousness. If that man has not paid attention to the commandments that I have inscribed on this stone and if he has forgotten my threatened curses and has shown no fear for the curses threatened by god, and if he has destroyed the rules I ordained and changed my commandments and emended what I have written, and if he has removed my name from the inscription and inscribed his own or has forced someone else to do it because of these threatened curses, almighty Anu, the father of the gods, the one who designed me to rule, will surely remove from him the splendour of sovereignty, whether that man is a king or a lord or a governor or a person appointed to some other function, and he will smash his staff and curse his destiny.

Such passages are usually referred to by scholars as *canon formulas*, and their purpose is that of securing the immutability of the laws, connected to the memory of the monarch (Levinson 2009). We could list many other examples from Near-Eastern legal texts, but it will suffice here to quote *Deuteronomy* 4.1-2, where Moses, on the

authority of God rather than on his own as king, proclaims: ‘And now, O Israel, give heed to the laws and rules that I am instructing you to observe, so that you can live to enter and occupy the land that the Lord, the God of your Fathers, is giving you. You shall not add anything to what I command you, or take anything away from it, but keep the commandments of the Lord your God that I enjoin upon you’ (trans. Levinson).

In contrast with this tradition, Western legal thought stresses the importance of the existence of ‘rules of change’ in the development of legal orders (in Hart’s analysis ‘rules of change’ are among the ‘secondary rules’ of which the law is constituted). There are of course various ways in which laws can be changed and innovation in legislation achieved: through statutory change (the simple passing of a new enactment that overrules previous ones), through creative interpretation of the open texture of existing statutes, or through revolutionary change (Schwartzberg 2007: 3-8). Statutory change can in fact be achieved, and in ancient times often was achieved, without an explicit admission that the new statute modified previous norms. With a bit of ingenuity, legal change can occur without any explicit statement that innovation is taking place. Because legal change over long periods of time is a normal occurrence for societies, it is not in itself particularly remarkable that it can be found also in societies where laws and rules were governed by *canon formulas*. But in order to establish a legal order, the explicit existence of ‘rules of change’ is key, because such rules recognize, institutionalize and govern legal change, so that change can happen legitimately and without disrupting the legal order. This is also why, in modern accounts of the ‘rule of law’, clear procedures and rules for making laws are considered one of the *condiciones sine quibus non* (cf. Raz 1977). A recent investigation of the role and importance of ‘rules of change’ shows them to be at the

root of the western concept of law, and identifies Rome as the first and only ancient society where such rules were explicitly formulated (Halpérin 2009). Historians do indeed agree that in Rome, as early as the Twelve Tables, the principle *lex posterior derogat priori* was the rule in matters of legislation (i.e. a new law which contradicts a previous one implicitly repeals it, and the newest law is the one valid at any given time). As will become clear toward the end of this chapter, however, Rome was not the only ancient society in which the legal order includes formal mechanisms to incorporate change in legislation. Such explicit ‘rules of change’ which conform to an impressive extent to the requirements of the ‘rule of law’ in matters of legislation as they are expressed e.g. by legal theorists such as Raz (1977), existed already in Athens during the fourth century BC. The fourth-century Athenian laws on legislation gave Athens a clear set of norms that gave the people the power of, and a procedure for, enacting new laws and changing existing ones.

The Athenian case is particularly interesting not only for the level of sophistication achieved by ‘rules of change’ in the fourth century BC, but also because such rules of change are not a characteristic feature of Greek legal systems from early on. Early Athens, like the other *poleis* during the Archaic and early Classical periods, subscribed to a large extent to a conception of the law as unmovable and unchangeable that is similar the conception found in the *canon formulas* of the Near-Eastern laws. Comprehensive procedures that recognized and regulated innovation in legislation were implemented as the Athenians came to deal with increasing inconsistencies between an ideology of legislation that denied change and a political system that affirmed popular sovereignty. The wealth of evidence for the decisive years of this process at the end of the fifth century BCE puts us in a privileged position: we are able to observe the Athenians as they, with only a few false steps, dealt constructively with

the contradictions inherent in their legal system and ideology and eventually recognized legal change and created formal mechanisms for achieving it. As they did this, they conciliated it with popular sovereignty and created extremely sophisticated rules of change that were to a great extent a development of, rather than a break from, the previous legislative practices and ideology. (The word ‘ideology’ is here used not to refer to an overarching political worldview, but rather to a set of interconnected beliefs and preferences that are attached to particular institutional contexts and condition individual and institutional behaviour in that particular domain; cf. Meyer, Sahlin, Ventresca, Walgenbach 2009: 1-15 for a discussion of various modern approaches to ideology and institutions.)

This chapter takes a primarily diachronic approach to Athenian legislation and examines the ideologies and debates underlying particular institutions and procedures in different periods. The key procedures at different times will be described, but what will be avoided is a ‘snapshot’ view of these procedures focused too exclusively on the *Realien* of day-to-day legislative activity at one particular moment. An approach that concentrates too much on the details of legislative rules without examining broad trends has yielded some paradoxical results. The most notable of these, which this chapter challenges, is the widely-held belief that the creation of detailed rules for legislative change represented a limitation of popular sovereignty in the Athenian democracy, and that the transition from the fifth century to the fourth century brought about a shift from an extreme form of democracy to the sovereignty of the law. Kahrstedt (1938, heavily criticized in Atkinson 1939) gives, to my knowledge, the first full formulation of this widespread tenet. The most influential exposition of this view is given by Ostwald (1986; 524): ‘In matters of legislation the Assembly relinquished its final say to *nomothetai*. Thus democracy achieved stability, consistency, and

continuity when the higher sovereignty of *nomos* limited the sovereignty of the people' (*contra* Sealey 1982 and 1987, who believed that Athens always had the rule of law, and never real democracy). Hansen (1974 and 1991: 150-55, 300-4) has also stressed that the locus of sovereignty shifted from the Assembly to the lawcourts (which have a stronger connection with the law), and Todd (1990: 170) claims that 'Athens was certainly constitutionally less democratic in the mid-fourth century'. Such statements are in striking contrast both with assessments of fourth-century democracy in contemporary authors and with the epigraphical evidence from the period: the word *demokratia* (although found in literary texts starting in the 430s) is never found in Athenian public documents preserved on stone before the restoration of democracy of 403 (the very constitutional change that most scholars interpret as a shift from popular sovereignty to the rule of law; the decree containing the term at Andoc. 1.96-8, attributed to 410, is a forgery – see Canevaro-Harris 2012: 119-125 and Harris, forthcoming b, *pace* Sommerstein 2014), but becomes very common afterwards (Harris, forthcoming a). The fourth-century orators refer to the regime in Athens as a *demokratia* all the time (cf. e.g. [Dem.] 59.88, Aeschin. 1.4-6, 3.6-7, Lyc. 1.3) with no contrast ever made with the rule of law (cf. Harris, forthcoming a and 2013a *passim*). The *Constitution of the Athenians*, by Aristotle or a student of his, states that ([Arist.] *Ath. Pol.* 41):

The eleventh [and final phase of the Athenian democracy, the fourth-century one] was the one which came into being after the return of the exiles from Phyle and the Piraeus, from which date it continued to exist until it reached its present form, all the time granting even more power to the people. For the people has placed itself in control of everything and administers everything through its decrees and its courts, in which the people holds the power.

And Aristotle himself in the *Politics* (1298b13-15), writing presumably in the 330s, states that ‘the democracy which is most considered to be democracy *nowadays* is one in which the *demos* is master over the laws – namely an extreme democracy’ (trans. Strauss). And what is the democracy that is most considered a real democracy in Aristotle’s day if not Athens? Aristotle had previously explained that the main feature of extreme democracy is that the *plethos* and not the *nomos* is sovereign, and this translates into a situation in which the *psephismata* (decrees) and not the laws are sovereign (1292a1-7; cf. e.g. Strauss 1991 on the identification in the *Politics* of the Athens of Aristotle’s day with extreme democracy). We will come back to these statements once the developments from the fifth to the fourth century and the legislative innovations introduced in 403 are examined. For the moment however it suffices to observe how different the Athenian view of developments in their political institutions during the fourth century BC is from that of scholars such as Ostwald and Hansen. This difference of opinions deserves scrutiny.

2. The unchangeability of the law: archaic lawgivers and entrenchment clauses

In Athens during the Archaic and early Classical periods, as well as in the other *poleis*, rules of change were not the norm. In this respect, the approach to changes in legislation recalled the Near-Eastern model of the *canon formulas*. A law from Argos dated between 575 and 550 BCE (*Nomima* I.100 = *IG* IV 506), possibly listing major crimes against the state (Jeffery 1961: 158), prescribes curses (as in the Near-Eastern examples quoted before) as well as exile and confiscation of all property for whoever ‘ignores the following provisions or deletes them’. Another law from the

last quarter of the sixty century (*Nomima* I.44 = ML 13, preserved on a bronze plaque), provides a Locrian colony, possibly Naupactus, with regulations about land. The law has the familiar list of penalties and curses for whoever annuls its provisions:

Unless under the pressure of war a majority of 101 men chosen from the best citizens decide to bring in at least 200 fighting men as additional settlers, whoever proposes a division or puts it to a vote in the council of elders or in the city (polis), or in the elected body, or makes civil strife about the division of land, he himself and his family shall be accursed for all time, his property shall be confiscated and his house demolished just as under the law (*tethmos*) about homicide. This law (*tethmos*) shall be sacred to Pythian Apollo and the gods who dwell with him; may there be destruction on the person who transgresses it, on him and his family and his possessions, but may (the god) be kindly to him who observes it. (Trans. Gagarin)

These formulas, which have been studied (for Athens) in an article by D. M. Lewis (1997: 136-49; cf. also Rhodes with Lewis 1997: 524-5), are usually referred to by Greek historians and epigraphers as ‘entrenchment clauses’. They perform the very same role as the *canon formulas* we discussed with Lipit Ishtar and Hammurabi, although the role in which the Greek legislator casts himself is very different from that taken by the king in the Near-Eastern codes – the fixity of the laws acquires in Greek thought a distinctly anti-tyrannical flavour (see Harris 2006: 5-14 with Hdt. 3.81). Similar measures discouraging or altogether forbidding any changes in the laws are recorded by later sources for many mythical or semi-mythical archaic legislators: Diod. 12.17 reports that Charondas of Catania stipulated that whoever wanted to propose a revision of one of the existing laws should do so with his neck in a noose, and if the proposal were unsuccessful he should be hanged. The same rule is attributed by Dem. 24.139-41 (cf. also Polyb. 12.16.9-14) to Zaleucus of Locris. These stories,

although found only in later sources and probably apocryphal, reveal that the Greeks of later periods viewed archaic legislation as a *una tantum* process usually accomplished by wise and authoritative lawgivers, by whom norms and laws were written down for ever, not to be changed or modified. A fragment of a text about innovation in legislation conveys the same message: the Anonymous of Iamblicus (*Vit. Pit.* 256), borrowing the formulation from the *Pythagorical Sentences* of Aristoxenus, states that the Pythagoreans ‘considered just to stay faithful to the ancestral customs and norms, even if slightly inferior to those of others, because to abandon easily the existing laws and to be inclined to introduce innovations would be neither convenient nor useful’. The frequent occurrence of the phrase *kata ta patria* (‘according to the ancestral customs’) both in inscriptions (it was often prescribed e.g. that sacrifices to the gods should be conducted *kata ta patria*; cf. e.g. *IG* II² 1283 ll. 25-6; 1289 l. 8; 1325 ll. 23-4; 1326 ll. 15-16) and in literary sources (Thuc. 2.2.4; 4.98.8; 4.118.8) also attests to the importance of adhering to the laws and customs of the ancestors, and to the widespread mistrust of legal innovation. Legislation was not the same as administration, and laws were given once and for all, hence the *canon formulas* and the entrenchment clauses.

If we turn to Athens during the Archaic period we find the same kinds of entrenchment clauses, and similar legends about legislators sealing their work and forbidding or discouraging change. The first recorded Athenian legislator is Draco, traditionally dated to 621/0. The information about his legislative action is mostly apocryphal and fragmentary at best, but we are lucky enough to have the stele where his law on (involuntary) homicide was republished in 409/8 (*IG* I³ 104), and the linguistic features of the text confirm that this must be a seventh-century law. The stele is very fragmentary and does not allow us to read any entrenchment clause.

Demosthenes (23) however reports various provisions from this law, which can be checked against the inscription and are accurate (cf. Canevaro 2013: 38-46 *passim*). He concludes (Dem. 23.62) his discussion of Draco's law by reporting this provision (which must therefore be reliable too):

Whoever, whether a magistrate or a private citizen, is cause of the violation of this statute, or will modify it, is to be disenfranchised, with his children and his goods.

There is more information about another Athenian lawgiver, Solon, whose legislation, traditionally dated to 594 BCE, was regarded in Classical Athens as the very foundation of the legal and political order of the city. Later laws, as late as the fourth century, were often wrongly attributed to him, and his legislative aims were often invoked by litigants during the fourth century BC to justify particular interpretations of a statute. The expression 'the laws of Solon' was often used to mean 'the laws of Athens' (see e.g. Hansen 1989 and Thomas 1994). Yet Solon's historicity is beyond doubt because we possess his poems, one of which (fr. 36 West) explicitly states 'I have written laws (*thesmous*) equally for the low and high alike, fitting straight justice to each' (Hölkeskamp 2005: 189 n. 33 with bibliography). His legislation must have been extensive (although it is incorrect to refer to his laws as a 'code'; cf. Hölkeskamp 1999 and 2005; his must have been rather a collection of pre-existing norms, a 'common law', cf. Schmitz 2004: 148-259 and Harris OHAGL on archaic law). His laws were written down on *kyrbeis* and were still legible in the fourth century on *axones* (see Stroud 1979, Davis 2011 with previous bibliography on these items), and many of them are quoted and discussed in later sources even though it may be difficult to tell which ones are authentically Solonian (see above all Ruschenbusch 1966, Rhodes 2004 and the essays by Blok, Gagarin, Rhodes and Scafuro in Blok-

Lardinois 2004 for various approaches, some more convincing than others). There is no secure evidence for an entrenchment clause in the laws generally attributed to Solon, but various sources recount us a story that, like those about Charondas or Zaleucus, demonstrates the lawgiver's attempt to avoid any change or revision of the laws. Both [Arist.] *Ath. Pol.* 7.2 and Plut. *Sol.* 25 tell us that after Solon gave the Athenians the laws, he had them swear by the gods not to change them for 100 years, and to make sure that they could not force him to change them himself, he left Athens for ten years (Hdt. 1.29 reports the very same story, but with the Athenians bound for ten years, and Solon also travelling for ten years – it is likely that the first figure is corrupt and merged into the other). One should consider that a period of 100 years, three generations, is in oral societies as far back or ahead as one can get, and 100 years is therefore usually employed to mean 'forever' (cf. Camassa 2011: 119). The same time entrenchment is found also in interstate treaties from the Archaic period (cf. e.g. *Nomima* I.52 and Manfredini - Piccirilli 1990: 255). Solon therefore effectively entrenched his laws, and later Athenians understood his intention as such. It must also be noted that although Solon was asked (and elected) by the Athenians to give them laws, there is no sign in the sources that his laws were enacted or approved by the Athenians – he bound them to follow the laws by making them swear an oath to this effect.

3. Solon and the nomothetic tradition in fifth century Athens

In the fifth century (that is, as soon as we have enough literary evidence to check), Solon was already recognized as the creator of the laws of Athens: Herodotus (1.29) introduces him as the man who gave laws to the Athenians at their request, and

Cratinus (fr. 274 Kock) refers to him and Draco while mentioning the *kyrbeis* where the laws were written down. Aristophanes' *Clouds* (1187), performed in 423 BCE, has Pheidippides explaining to his father the law on summons by appealing to the intent of Solon in the very same way litigants do in fourth-century speeches (e.g. Hyp. *Athen.* 13-22; Dem. 18.6, 22.8-11, 25, 30, 36.27, [Dem.] 58.11; Lyc. 1.9; Lys. 31.27; Isae. 2.13). In the *Birds* (1660) a law on bastard sons not being entitled to inherit is also attributed to Solon. Because the laws of Athens, as soon as the fifth century, derived to a large extent their validity from the authority of Solon as a lawgiver, it is useful at this point to describe the conception of legislation implicit in the laws of Draco and Solon. We should expect this to be reflected in the fifth-century Athenian ideology of legislation, or at least as part of a debate on legislation and innovation in legislation.

Viewing the laws as the product of Solon's individual achievement implies first and foremost an institutionalized understanding that laws should not be changed. Although the Athenians elected Solon to give them laws, they subsequently bound themselves to follow them and keep them unchanged by swearing an oath. So, although the lawgiver is not an autocratic king and is appointed by the community, the laws derive their authority not simply from the vote of a sovereign Assembly, but also from the personal authority of the lawgiver himself, recognized by the citizens in their oath. As a result, legislation is not part of the daily business of the *polis* (legislation is separated from administration, see Harris 2006: 12, 15-16), but rather a special enterprise undertaken by special *nomothetai* at special times. Laws therefore acquire from their origin in the action of a *nomothetes* some characteristics that will heavily condition later developments of legislation, in particular in 403 BCE, when the Athenians eventually dealt with the relevant institutions and defined what a law is. They are meant to be valid forever, so they are not temporary measures, and they are

not the same as other, more ordinary decisions and actions taken by the *polis* in response to their day-to-day business. Moreover, since they were created by an individual *nomothetes*, they are the product of a unified intention and rationality (Harris 2013: 201-2). Therefore, despite the fact that Solon's laws did not amount to a 'code', the Athenians understood them as part of a system, carrying an inherent rationality, and as consistent and coherent (Canevaro, forthcoming b; *pace* Hölkeskamp 1999: *passim*).

The existence and extent of such a conception of laws and legislation are clear in many passages from Athenian literature of the fifth century BC. One particular passage from Antiphon (5.14–15 = 6.2), who praises Draco's laws on homicide, expresses beautifully the Athenian veneration for the oldest laws, their authority, and the belief in their perfect coherence:

I think that all would agree that the laws that are established about such matters are the finest and most righteous of all the laws. They are indeed the oldest laws in this land, and furthermore they are absolutely consistent [literally 'they are the same about the same things'], which is the greatest indication that laws have been well made. For time and human experience teach men what is unsound [...] And thus the laws about homicide, which no one has ever dared to overturn, have been established in the best way' (trans. Harris).

In a passage from Aristophanes' *Clouds* (1187), performed in 423 BCE, Pheidippides explains to his father the law about issuing a summons by appealing to the intent of Solon, also shows how Solon was considered the foundational authority of Athenian law, and how the coherence and consistency of his legislation could be predicated on his overall intent. In Aeschylus' *Eumenides* the theme of the unchanging nature of the laws is central: at l. 484 Athena says that she 'will lay down a law for all

time' (cf. also ll. 570-3) and at ll. 690-5 after founding the court of the Areopagus she explicitly states that 'upon [this hill], the respect and inborn fear of the citizens will prevent any wrong being done, alike by day and by night, if the citizens themselves do not make innovative additions to the laws: if you sully clear water with foul infusions of mud, you will never get a drink' (trans. Sommerstein). Athena, as a lawgiver, gives laws because of her own authority, and these laws must not be changed. In Sophocles' *Antigone*, when Creon eventually realizes his mistake in ordering that Polyneices stay unburied and in condemning Antigone to death for contravening his order, he ruefully admits: 'I fear that it is best to live one's life until the end preserving the established laws' (1113-14, trans. Harris). He realizes that his order contradicts and overrules a divine law, that the dead should be buried, and so effectively a temporary rule decreed by him in response to a matter of daily business, a decree enacted by the ruling power in the city, contravenes and changes the 'established laws' (used only here in the entire play; on law, divine law and the *Antigone* see Harris 2006: 41-80). A hierarchy between the 'established laws' and 'any put into force in future' is also established in the Ephebic Oath (RO 88, a fourth-century inscription, but parts and elements of the oath are believed to be archaic) when the ephebes' obedience to the second category is qualified by the adverb 'reasonably' (*emphronos*): 'And I shall be obedient [...] to the laws currently in force and any reasonably put into force in future.'

While a hierarchy between the laws of the lawgiver and the enactments of the community are clearly implied in much of our evidence, it is notable how, with the growing power of the *demos* from the late sixth century on, and the widening of the scope of their political action, the ideology of legislation derived from the action of the archaic *nomothetai*, which we could call 'nomothetic', is used to give durability and authority to more recent enactments. In Aristophanes' *Thesmophoriazousae* (ll. 352-

71) the chorus lists women who are impious and harm the city, and among these are women who attempt to alter *psephismata* and *nomos*. While the use of the singular *nomos* opposed to the plural *psephismata* seems to imply some sort of hierarchy between the law as a sphere and the individual enactments of the Assembly (*psephisma*, connected with the *psephos*, the ballot, refers to measures voted by the people), it is notable how both need to be left untouched, and how altering them is equated with harming the city. That laws should not be changed is also the key contention in Cleon's argument in the Mytilenian debate, and yet the passage is vague on what exactly it is that should not be changed: a decree of the previous day about slaughtering all the male Mytileneans, a law about not altering previous enactments, or perhaps a law about not revolting during war time based on the allies' oaths (Thuc. 3.37.3-4; cf. Harris 2013b: 98 n. 19). In 427 BCE the Athenians manage to subdue the rebellious Mytileneans and decree in the Assembly, advised by Cleon, that all males should be killed. The next day Diodotus manages to reopen the discussion so that the Athenians may change their mind and avoid the slaughter. Cleon argues against this proposal that 'The most alarming feature in the case is the constant change of measures with which we appear to be threatened, and our seeming ignorance of the fact that bad laws which are never changed (*nomoi akinetoi*) are better for a city than good ones that have no authority' (3.37.3, trans. Crowley). Argumentative strategies typical of the nomothetic tradition are made to apply more widely also to other enactments, even decrees by the *demos*, in order for them to acquire authority and durability. By doing this, the Athenians seem to blur the distinction between legislation and administration that is implied in the nomothetic tradition, and add to the laws of the *polis*, those of Draco and Solon, the enactments of the *demos*. This development, as we shall see, will give rise at the end of the fifth century to important

debates which will mark the various attempts of reform. Yet even in this development there is no trace of any explicit rules of change: enactments of the *demos* can supplement the laws of the lawgiver, but they do not modify them, nor do they cancel them, and in fact, when they need to be made particularly stable, they are themselves deemed unchangeable, and sometimes, as we shall see, made so.

4. The reality of Athenian legislation in fifth-century Athens: immutability and tacit legal change

Before exploring how legislation worked in the fifth century and how it was reconciled with the ideology of unchanging stability, it is necessary now to discuss some important points about legal terminology. Up to this point I have deliberately avoided using Greek words to refer to statutes, and have preferred the English term ‘law’ according to the use of the term by legal anthropologists such as Pospisil (1974): 1) there is an authority with the power to enforce the law; 2) the law is meant to be the same for all, and to be applied to all similar situations in the future; 3) there is a part of the law that “states the rights of one party to a dispute and the duties of the other”; 4) the law contains a sanction. The reason for which I avoided a specific Greek term is that until the end of the fifth century no Greek term is used exclusively to describe a binding rule or enactment consistent with such a definition: although all of them are often used to describe such binding rules or enactments, they are also used for temporary, *ad hoc* enactments. In fact, the application of the word *nomos* exclusively to rules that conform to the concept of ‘law’ that I have just provided is a product of the developments I am describing, rather than their precondition.

The Greeks used various terms to indicate a binding rule or enactment: Draco’s

and Solon's are referred to in sources from the Archaic period as *thesmoi* (this is the word Solon himself uses), with a focus on the laying down of the law (*tithemi*) which characterizes legislation, consistently with what we have been saying, as a top-down activity. But one should not read too much into the difference between the terms *thesmos* and *nomos*, which are often used interchangeably (Hölkeskamp 2002: 123-6). Terms such as *graphos* and *grammata* refer to the written dimension of the law (as opposed to *rhētra*, 'what has been said'), whereas the term *nomos* is connected to the verb *nemein*, 'to distribute', 'to allocate' (Ostwald 1969: ch. 1; Quass 1971; de Romilly 2001: ch. 1; Hölkeskamp 2002; Harris 2006: 41-61). In fifth-century Athens words like *thesmos* and *graphos* are rare in reference to rules and enactments (*thesmos* is used only occasionally to refer to Solon's and Draco's laws), but the word *nomos* is used along with *psephisma* (normally translated as "decree"), which refers to the act of voting on something in a sovereign Assembly. None of these terms perfectly and exclusively covers the semantic range we have isolated with Pospisil's definition (although most of them can be used for rules or enactments that are consistent with Pospisil's definition), and although the terms have different focuses, they are mostly used interchangeably, with *nomos* used more commonly when the focus is on the contents of a rule, *psephisma* when the focus is on the enactment of the rule (Hansen 1978: 316). To give only two examples, the law of Cannonus about offences against the *demos* is a *nomos* at Xen. *Hell.* 1.7.20, but a *psephisma* at 23. And the decree of Isotimides is a *psephisma* at Andoc. 1.71, 86, 103, but a *nomos* at Lys. 6.9, 29.52. Because we lack clear-cut distinctions, terminology is not a reliable guide in exploring whether, and how, laws were enacted and innovation in legislation happened in the fifth century. Using Pospisil's analysis of the features implicit in the term 'law' will help us to distinguish laws from decrees, that is, enactments with a limited application

in time and scope arising from the day-to-day administration of the *polis*. On the other hand, the fluid nature of these terms helps to explain how concepts and ideologies originally attached to the nomothetic tradition could be extended to cover recent enactments of the Assembly, and how this in turn caused debates and disagreement about what is legitimate legislation and what is not.

It should not come as a surprise that in the fifth century the Athenians did enact ‘laws’, that is, general provisions with broad application, and that some of these laws did in fact modify the previous legislation of Draco and Solon. To give only a few examples, we know that Cleisthenes at the end of the sixth century enacted new laws (*kainoi nomoi*, [Arist.] *Ath. Pol.* 22.1), e.g. created a new Council of 500, whose numbers were determined by his new distribution of the Athenians in ten tribes. Some of these regulations are likely to have survived in the republished *IG I³ 105* (Rhodes 1972: 194–199; Shear 2011: 76–8), which refers to a Council of 500. If we believe that Solon enacted at least some constitutional laws (and whether we believe in his Council of 400 or not; see Rhodes 2006), Cleisthenes must have modified them at least to some extent, and his reforms are evidence not only of legislation but of modification of previous laws. On the other hand, it is still possible that Cleisthenes’ action could be represented as the special action of a *nomothetes*, the same way as Solon’s was, and [Arist.] *Ath. Pol.* 29.3 has Kleitophon in 411 propose that the *syngrapheis* search for his *patrioi nomoi* (ancestral laws), which are similar to those of Solon. His legislative innovation could still be consistent with the nomothetic tradition, as Cleisthenes is a special *nomothetes* who restores democracy after tyranny.

But we know of rules passed at a much later date that can be categorized within our definition of ‘law’, and which must have been passed by the Assembly. For example Callias’ decree of 434/3 (ML 58B), which orders magistrates to spend money

exclusively on the construction of the Acropolis, or else ask the Assembly for authorization to use them for other purposes, imposes at ll. 17-19 on those who violate these provisions the same penalty that is inflicted on those that propose an *eisphora*, a special direct tax for war expenses, without first asking *adeia*. The use of *eisphora* is first attested in 428 (Thuc. 3.19.1), and *eisphora* as we see it in the classical age was not created much earlier than this date (Rhodes 1981: 193; Kallet-Marx 1989: 112-13 n. 84; cf. van Wees 2013: 84-97 for *eisphora* in the Archaic period). So we have here a new law, enacted by the Assembly. Yet this law may not be an actual modification of previous statutes. By this period the Assembly is legislating, but this example does not prove that it occasionally changed previous laws. The same however cannot be said of the various reforms of the archonship as they are reported in [Arist.] *Ath. Pol.* 22.5, 26.2, 47.1: the archonship was originally restricted to the *pentakosiomedimnoi*, and the archons were elected, but from 487 the archons were selected by lot, and from 457 *zeugitai* were granted the right to be archons (see however Ryan 2002, who believes that *zeugitai* could be archons earlier; see Surikov 2012 for a recent account). And Pericles' citizenship law of 451/0, which restricted Athenian citizenship only to those who had both an Athenian father and an Athenian mother ([Arist.] *Ath. Pol.* 26.4; Plut. *Per.* 37.2-5), must have altered some previous statutes and rules. These must have been actual changes to the laws of the city, and are evidence that such changes did happen.

So what should we conclude from this? Should we infer that the claims about the unchangeability of the laws, consistent with the nomothetic tradition, expressed ideas that in the fifth century had no connection with reality, and that rules of change did in fact exist, in the form of the principle *lex posterior derogat priori*? The sources do not warrant this conclusion. Legislative changes, as has been observed at the beginning of

this chapter, are, as it were, a fact of life, and should not surprise us too much. What is more interesting is whether these changes are institutionally recognized and, if they are not, what are the consequences for the legal order. Changes can be introduced as new laws without explicit recognition that they contradict previous laws that are entrenched and cannot be repealed. The two laws stay valid at the same time, and if the older law is in practice superseded, there is no institutional recognition that it is now invalid, and no attempt whatsoever is made to harmonize the legal order. In such a context, in which there are no rules of change, old statutes could theoretically, on occasion, be used by litigants, who therefore act within an inconsistent legal order that falls short of the rule of law. Moreover, any change in the laws disrupts the legal order, which does not contemplate such changes, and therefore is to an extent illegitimate, or at least prone to be represented as illegitimate in particular political contexts.

Both these issues are found in our sources about fifth-century Athens: we will see that in the last decade of the fifth century the Athenians undertook to republish the laws of Draco and Solon, and evidence of the republication shows that later statutes were also encompassed under this rubric. This undertaking evinces uneasiness with the current status of their legal order, presumably confused and unmanageable, which they aimed to correct by collecting all the laws of the city and republishing them near the Stoa of the *basileus*, in an easily accessible place. The accusation made against Nicomachus (Lys. 30.3), one of the *anagrapheis* in charge of the process, that parties in suits received the laws from his hands and would show up at the trial with opposite laws stating opposite rules, may be further evidence of the existence of contradictory laws that were concurrently valid. The speaker blames this on Nicomachus, who was in his opinion usurping the role of a *nomothetes*, but this is slander within the context of an accusation speech. It is possible that if litigants could produce opposite laws, this

was because there were already contradictory laws, and none of them had formally been abrogated. *Lex posterior non derogat priori*, it just becomes valid side by side with it. In any case, the possibility of such an accusation shows a widespread uneasiness with the state of the laws of the city.

As for the issue of the legitimacy of such unrecognized and unregulated changes, the very frequency of the claims in Athenian sources that laws should not be changed is at least evidence that illegitimate changes in the laws were recognized as a problem. The issue became even more central in the context of the various oligarchic revolutions of the late fifth century. The various successive regimes – the Four Hundred, the Five Thousand, the Thirty – all justified their existence and the disruptions to normal democratic institutions as an attempt to go back to the *patrioi nomoi* and the *patrios politeia*. The *syngrapheis* of 411 were appointed, according to Cleitophon's amendment, to search for the *patrioi nomoi* of Cleisthenes, 'because the constitution of Cleisthenes was not democratic but similar to that of Solon' ([Arist.] *Ath. Pol.* 29.3). Their claim that their revolution was in fact meant to go back to the ancestral constitution as sanctioned by the lawgivers is an implicit rejection of all changes made afterwards. The Five Thousand also tried to appropriate the *patrios politeia* and gained legitimacy by linking their rule to the laws of Draco, Solon and Cleisthenes (see Shear 2011:51-3; for various approaches to these regimes see e.g. Harris 1990, Osborne 2003 and Shear 2011: 19-69 *passim* with extensive bibliography). The Thirty came to power in 404 BCE, under Spartan pressure, following a decree proposed by Dracontides and approved by the Assembly that gave them the task of drawing up the ancestral laws (*patrioi nomoi*) for the city (Xen. *Hell.* 2.3.2; [Arist.] *Ath. Pol.* 35.1; cf. Diod. 14.4-I; Fuks 1953: 75- 6; Ostwald 1986: 477-8; Shear 2011: 166-87). We know from [Arist.] *Ath. Pol.* 35.2 that they took down from

the Areopagus the laws of Ephialtes and Archestratus about the Areopagites, and deleted from the laws of Solon those gave rise to disagreements (*osoi diamphisbeteseis eschon*). Their aim with these measures seems to be that of addressing the two main problems that fifth-century attitudes to legal change caused in the Athenian legal order: the illegitimacy of new laws passed after the sixth-century lawgivers, and the inconsistency and lack of clarity and rationality that as a result had been introduced in the laws, and which gave rise to disputes (Ostwald 1986:479-80; Krentz 1982:61-2).

There is also positive evidence that in the fifth century, despite the fact that legal change happened, the Athenians still adhered in their political institutions to an ideology that was averse to change in legislation, and still considered entrenchment clauses a binding and effective safeguard against legal change. We know this because they still used such clauses to guarantee permanence to many measures passed in the Assembly, often not even laws but rather decrees. We have mentioned before ML 48B, which ordered that money should be spent for the building program on the Acropolis, and if anyone proposed a different use without previous authorization by the Assembly, he would suffer the same punishment as those who propose an *eisphora* without previous authorization (ll. 17-19). The Standards Decree about the use of weights, measures and coinage in the Athenian Empire, also contains a provision inflicting a penalty on those that make a proposal against the terms of the decree, or on the magistrate who puts the proposal to the vote (ML 45 cl. 8; cf. Lewis 1997: 136-49). Why would the Athenians still add entrenchment clauses to their enactments if they institutionally recognized that legal change happened and was legitimate? The one case we know of in which the Athenians agreed to repeal an entrenchment clause in order to contravene with their enactments a previous decree (Thuc. 8.15.1) is evidence of how exceptional and outrageous such a decision was felt to be. At the

beginning of the Peloponnesian war the Athenians enacted a decree that set aside 1,000 talents. This could not be touched except in the case of a naval invasion (Thuc. 2.24). After the defeat in the Sicilian expedition, in 412, they decided to use this money, because of the exceptional situation, the enormous losses in men, wealth and ships that the expedition had caused, and the general prostration of Athens and the wide-spread rebellions in the empire. Yet there was no naval invasion, so the proposal would have contravened an entrenched decree. The fact that they agreed to overrule the entrenchment clause and touched the money only in a moment of exceptional danger for the city, after they had left it untouched for almost twenty years of war, is evidence of how seriously they took such clauses.

To summarize our analysis so far: in the fifth century the Athenians enacted decrees and laws, as is natural, yet when one of their enactments contradicted one of the existing laws, they ignored the contradiction, and both statutes formally remained valid, which resulted in inconsistencies in the legal order of the city. So, while legal change actually happened, there were no rules of change, and the institutional ideology of the city still adhered to the nomothetic tradition and conceived the laws of the city as an unchangeable and coherent whole. The system was characterized by a certain ‘cognitive dissonance’ regarding legal change, and was ambivalent about new legislation *tout court*. This situation had its critics, and some in the city (as we have seen when discussing the revolutions at the end of the century) held that legislation was the exclusive province of specially appointed *nomothetai*, and that laws derived their authority not from the *demos*, but from the legislative action of such lawgivers.

At the other end of the spectrum, and in particular in the philosophical circles of the Sophists, it was thought that laws were human creations that derived their authority from the community and were valid only as long as the community

considered them advantageous. Such a conception questioned the nomothetic tradition, and proposed to solve the impasse between ideology and practice by adapting the ideology to the actual practices of unavoidable legal change, rather than questioning legal change and innovation *tout court* on the grounds of its validity. In Plato's *Theaetetus* Socrates, reporting the opinions current in Protagoras' school, states (172b2-6) that 'concerning what is just and what is unjust, what is pious and what is impious, they are willing to say with confidence that none of these things has by nature an existence of its own, but the opinion that is commonly held, this is true when it is adopted and remains true as long as it is adopted'. And at 167c4-5 he simply states 'what seems to a *polis* just and good, this is just and good for it, as long as it believes it to be so'. In Xenophon's *Memorabilia* (1.2.42), when Alcibiades asks Pericles what he thinks a *nomos* is, Pericles replies simply: 'Laws are all the rules approved and enacted by the majority in assembly, whereby they declare what ought and what ought not to be done' (trans. Marchant). This is also the position advocated by Pheidippides, a pupil of the sophist Socrates, when he justifies changing the law about beating parents (Ar. *Nub.* 1391-1450): since the law was enacted at one time in the past, I have the right to make a new one in the present. Aristophanes reacts in this play and in this passage against such a radical position about (among many other issues) legal change.

5. The first attempts to resolve dissonant views and practices of legislation: *graphe paranomon* and oligarchic revolutions

The Athenians, as they seemed to realize the problems of their legal order and proposed various solutions in their theoretical reflections, also attempted at various points in the fifth century BC to intervene in the system and solve its contradictions

and bad practices. The first of such attempts found in the sources is the institution of the *graphe paranomon*, a public action against measures that violate the laws. This procedure is extensively attested for the fourth century, but the sources mention very few cases for the period before 403/2. The earliest reliable evidence for this procedure is Andoc. 1.17, 22, where we are told of a successful *graphe paranomon* brought in 415 by Leagoras of Cydathenaeum against Speusippus for a decree proposed in the Council. The case was heard by a panel of 6,000 judges, and the decree was repealed. Another case of *graphe paranomon* against Demosthenes of Aphidna could be detected in the title of one of Antiphon's speeches (Fr. 13, 47), and the trial must be dated to before Demosthenes' departure for Sicily in 414 (Hansen 1974: 28). In 406 Euryptolemus of Alopeke and others attempt to indict with a *graphe paranomon* the decree of Callixenus that proposes that the Assembly should immediately pass a verdict collectively by secret ballot on the generals for not having recovered the dead after the battle of Arginusae (Euryptolemus charged this decree as *paranomon* because it did not grant the defendants their right to a normal trial, see Aeschin. 3.197-8; cf. Harris 2013a: 242-3). They have to withdraw the summons when Lyciscus passes a further decree that proposes to try them with the generals.

Scholars have variously placed the creation of this procedure as early as the years right after Ephialtes' reforms in the 460s (e.g. Rhodes 1972: 62) or as late as those immediately before 415 (e.g. Wolff 1970: 21). The basic features of the procedure are as follows: 1) during the discussion of a bill or after it had been approved (Xen. *Hell.* 1.7.12-14; Dem. 22.5, 9-10; cf. Hansen 1991: 206) anyone among the Athenians who wanted to do so could indict the bill for being *paranomon*, that is, against the laws; 2) the accuser had to swear that the decree is illegal (*hypomosia*; cf. Wolff 1970: 28) and later 3) present a written text to the *thesmothetai*

explaining why the decree was illegal, citing as supporting evidence the statutes that prove that it is illegal; 4) if one dropped the case after the *hypomosia* he was fined 1,000 drachmas and was forbidden to bring any public actions in the future (Harris 2006: 405-22); 5) the same happened if the accuser failed to receive at least one fifth of the votes at the trial; 6) the case was judged by a panel of at least 500 judges and possibly as many as 6,000 (Andoc. 1.17); 7) if the accusation was successful, the decree was repealed if already enacted, or could not be enacted at all if it had been indicted before the vote in the Assembly; 8) if the proposal had not been approved by the Assembly before being indicted and the prosecution was unsuccessful, the proposal went back to the Assembly for approval (*pace* Hansen 1987: 63-73; cf. Hannick 1981: 393-7); 9) if less than one year had elapsed since the presentation of the bill (Dem. 23.104), the proposer could be given any penalty from a small fine to death or full *atimia* (Hyp. Eux. 18; [Dem.] 58.1; for the reconstruction of the procedure cf. Wolff 1970 and Hansen 1974, with the further remarks in Hansen 1991: 205-12).

We know that in the fourth century the *graphe paranomon* enforced the principle that *psephismata* cannot override *nomoi* (cf. below Section 6), and therefore this procedure performed a role akin to that of a modern charge of unconstitutionality, repealing decrees that were not in accordance with a hierarchically higher set of rules, the *nomoi*. But in the fifth century this cannot have been the case, because there was no clear distinction between *nomoi* and *psephismata* (cf. e.g. Wolff 1970: *passim* and Hansen 1974: *passim*; Sealey 1987: 49-50). What was therefore the rationale of this procedure? Some speculation here is necessary, but the very name of the procedure, *paranomon*, implies that the enactments to be indicted and repealed are those that contradict some laws (the use of *nomos* has probably to do with a focus on the

contents of existing statutes). This procedure therefore instituted a judicial review (cf. Lanni 2010 and Pasquino 2005, 2010 for comparisons of this procedure with modern forms of judicial review) of the decisions made in the Assembly by the *demos*, whose main concern was to prevent the enactment of measures that contradicted existing ones by providing a chance to repeal them, and to discourage with penalties anyone from presenting such proposals. Its role was therefore that of assuring the consistency of the laws of the city, which, as we have seen, was a key feature of the ideology of legislation. It did this by actively preventing tacit legal change by measures that contradicted previous laws but did not do so explicitly. It also provided a legal procedure for challenging it. On the other hand, against the wishes of the conservatives in the city who denied the legitimacy of legal innovation performed by the *demos*, it implicitly recognized that new legislation enacted by the *demos* was valid and legitimate, as long as it was not inconsistent with previous legislation. So it was not only the laws of the sixth-century lawgivers that were legitimate, but also any further enactment, with the proviso that if a new law was inconsistent with a previous one, the principle *lex anterior derogat posteriori* applied.

Yet this issue could be easily avoided by repealing in the Assembly previous enactments that contradicted one's proposal before enacting it. This is what happened during the debate about Mytilene in 427: Cleon convinced the Assembly to pass a decree imposing the death penalty on all adult males of the city and slavery for women and children. The next day, the Council authorized a new debate on the same topic, and at the meeting of the Assembly a new decree was passed, which rescinded Cleon's decree. In 415 Alcibiades convinced the Assembly to send an expedition to invade Sicily. At a later meeting of the Assembly, Nicias tried to raise the issue again and asked the *prytanis* to take a new vote on Alcibiades' earlier decree about the

expedition (Thuc. 6.14; cf. Harris 2014, who shows that there was no rule against overturning in the Assembly previous decisions of the *demos*). But what about entrenched laws, like the laws of Draco and Solon and presumably most ancient laws of the Athenians, as well as many decrees of the fifth century? These could not be repealed, and the *graphe paranomon* did not provide any means for repealing them. So, by giving any Athenian the chance to indict a new enactment if it contradicted an existing law, this procedure tackled the issue of the contradictory Athenian attitudes to legislation by finding a middle ground between the need to recognize the authority of the *demos* and that law is anything the *demos* approve and the need to respect the ancestral laws, which derived their authority from the ancient lawgivers and derived their respect from their origin in the distant past. The new procedures allowed for the enactment of new rules in the Assembly, without restricting their possible scope in day-to-day administration, but at the same time prevented the enactment of anything which contradicted the ancestral laws, or any subsequent measure which had been entrenched, so preventing legal change, even of a tacit kind.

Such a solution eventually proved inadequate because it relied on volunteers and therefore did not tackle the issue of inconsistent enactments effectively enough. Moreover, the middle ground presumably did not satisfy the conservatives (averse to any form of legal change by the *demos*) who tried to change the constitution by revolutionary means in the last decade of the fifth century. From the scanty evidence we possess, it is clear that they did not consider the laws enacted by the *demos* after the sixth-century lawgivers as legitimate, and they disapproved not only of legal change, which the *graphe paranomon* attempted to tackle, but also of legal innovation *tout court*. We have already mentioned that the Thirty took down from the Areopagus the laws of Ephialtes and Archestratus, and rescinded laws that gave rise to

disagreements. A particular provision of the ‘Constitution for the present’ expounded by [Arist.] *Ath. Pol.* 31.3 in relation to the activities of the Four Hundred in 411 is even more relevant here: the constitution sets various rules and a sovereign Council of 400, and orders that they must follow any laws that may be enacted about *ta politika* (enacted in this constitution) and not be allowed to change them or enact others. Not only is legal change forbidden; no new laws can be enacted at all. (It is immaterial here whether this ‘Constitution for the Present’ is believed to have ever been put into practice, it is enough that it represents a debate and positions of the late fifth century; see for this debate e.g. Rhodes 1981: 365, 385-9, Ostwald 1986: 379-85; Harris 1990; 1997; Shear 2011: 22-49.)

It is not surprising therefore that in the late fifth century the Athenian oligarchs, when they attempted to gain power and to solve the problems and contradictions of the Athenian political and legal system in their own way, should follow patterns that are tightly embedded in the nomothetic tradition of legislation. We have seen that both the Four Hundred and the Thirty argued that they were in fact going back to the *patrioi nomoi* of Draco, Solon and Cleisthenes, dismissing therefore all the enactments of the *demos* as illegitimate. And they both envisioned constitutions in which legal change and the enactment of new laws were actually forbidden (cf. the ‘constitution for the present’ at the time of the Four Hundred), and took active steps to destroy and repeal the enactments of the *demos* in previous years (e.g. the laws of Ephialtes and Archestratus). Yet their own reforms constituted legal change, to such an extent that both the Four Hundred and the Thirty had to abolish the procedure of *graphe paranomon* in order to be able to perform it (cf. [Arist.] *Ath. Pol.* 29.4 and Thuc. 8.67.2 for the Four Hundred, Aeschin. 3.191 for the Thirty).

How did they justify it, and how did they construct their role? In a recent study

of legal change Melissa Schwartzberg (2007: 7-8) explicitly recognized constitutional revolution as a means of legal change, and this is the form the oligarchs adopted in both instances. The reason for this is that within an ideology that forbade legal change as a matter of normal business of the *polis*, the most legitimate and only acceptable instrument for changing the laws and the *politeia* was the institution of special committees, time-bound, who would perform the task of reforming/restoring the constitution. So in 411 the oligarchs (according to [Arist.] *Ath. Pol.* 29.2 Pythodorus) proposed in the Assembly the election of *syngrapheis autokratores* (ten according to Thuc. 8.67, twenty according to [Arist.] *Ath. Pol.* 29.2): plenipotentiary special officials whose job was that of drafting measures for the safety of the city. These immediately repealed the *graphe paranomon*, effectively starting a constitutional moment during which they proceeded to propose various new statutes and change the constitution of the city (under the pretense, however, of restoring the *patrioi nomoi*).

Why is this more acceptable within a strict interpretation of the nomothetic ideology than normal legal change performed by the Assembly? Because the action of such a committee can be constructed as parallel to that of the archaic *nomothetai*: legal change is not a matter of ordinary administration of the *polis*, but is restricted to special moments in which plenipotentiary lawgivers (*nomothetai* or *syngrapheis autokratores*) give (or restore) the laws. Once this process is completed, the laws are to become once again unchangeable, as they are in the ‘constitution for the present’. Legal change, consistently with the nomothetic tradition, is the province of specially appointed *nomothetai*. And in fact, after the Four Hundred, Thucydides informs us that the Five Thousand proceeded to elect *nomothetai* (8.97.2), presumably for the purpose of changing/restoring the *nomoi* (or implementing the reforms promised by the Four Hundred, see Harris 1990; 1997). And in 404 the Thirty themselves were appointed by

a decree of Dracontides as a special committee whose task was that of drawing up the (ancestral) laws: they acted as *nomothetai*. In this capacity they proceeded to make important changes to the laws of the city. For instance Xen. *Hell.* 2.3.51 shows us Critias, during Theramenes' trial, mentioning 'new laws'. Among these there was one that forbade the killing of anyone of the Three Thousand without the authorization of the Council, but allowed the Thirty to kill freely anyone else they wished (for a discussion of the innovation and changes to the laws of the Thirty see Shear 2011: 172-5). The oligarchs appointed *nomothetai*, special lawgivers whose task was exceptional and time-bound, for the purpose of enacting their constitutional reforms, and justified their actions as an attempt to restore and save the city from illegitimate legal change performed by the *demos* in the last century as a matter of day-to-day administration, which had resulted (in their opinion) in a general incoherence of the laws of the city, and therefore in the breakdown of the rule of law. Their concerns, as we have seen, were not far from those of whoever enacted the *graphe paranomon*, and are to be found behind the reforms introduced by democratic governments in the same years. Yet ultimately they were aborted, and can be considered as false steps in a process of reform that was caused by the city progressively becoming conscious of the limits of its dissonant approach to legislation during the fifth century.

6. The revolutionary reforms of the late fifth-century *nomothetai*

Unlike the reforms attempted by the oligarchs, those that were enacted by democratic regimes in the last decade of the fifth century were successful in tackling the issues of legal change and innovation (the literature on these reforms is immense, see e.g. Kahrstedt 1938, Harrison 1955, Robertson 1990, Rhodes 1991, Carawan 2002,

2013, Joyce 2008, Shear 2011: *passim*, but now see Canevaro-Harris 2012: 110-16). They form the basis of the legal system that confronts us in the speeches of the orators from the fourth century BCE. Yet these reforms were not enacted in one day, and allow us to see an internal development. The most momentous action undertaken by the restored democracy in 410 was the republication of the ‘laws of Solon’. The most detailed account of this process is found in Lysias’ speech *Against Nicomachus* (30.2-5). Although the speech was delivered by an accuser understandably hostile to the defendant, many statements in the speech find confirmation in a contemporary inscription (*IG I³ 104*) and can be considered reliable. This speech attacks Nicomachus in his role as *anagrapheus* of the *nomoi*. The verb *anagraphein* is found in inscriptions always in conjunction with ‘on a marble stele’, and means ‘to post’, ‘to publish’. So the role of Nicomachus was that of ‘publishing the laws’. Lysias (30.2-3) tells us that he was appointed after the restoration of democracy in 410 and was given the task of writing up the laws of Solon in four months, yet he stayed in office for six years, and never submitted to examination (*euthynai*) because the city in 404 was defeated by the Spartans. After the fall of the Thirty and the restoration of democracy in the archonship of Eucleides in 403/2 BCE, Nicomachus was reappointed to this task and remained in office for another four years. According to Lysias, Nicomachus received bribes to add certain laws and cancel others, so he acted illegitimately as a *nomothetes*, and often he would give litigants opposing laws. The prescript of Draco’s law on homicide, republished in 409/8, confirms some details of Lysias’ account, and adds some others:

Diognetos of Phrearrhos was Secretary, | Diokles was Archon. | Resolved by the Boule and the People, Akamantis held the prytany, [D]io[g]netos was Secretary, Euthydikos presided, [. .]e[. .]anes made the motion. The || law of Drakon about homicide shall be

inscribed by the Recorderls of the laws (*Anagrapheis*), after they have received it from the King Archon, jointly with the Secretary of the Boule, on a marble stele, and they shall set it up in front of the Stola Basileia. The Poletai shall let the contract according to the law. The Hellenotamiai shall supply the money. (Trans. Gagarin)

This prescript confirms that *anagrapheis* of the *nomoi* were in charge of republishing the laws, but corrects the impression given by Lysias that Nicomachus acted alone by showing that the *anagrapheis* were a board. Lysias also claims that Nicomachus could cancel and add laws at will, but the inscription shows that all the *anagrapheis* did was to present the texts of the laws to the Assembly, which then voted to accept or reject them. Those approved were inscribed on stelae posted in front of the Stoa of the King. Andocides' speech *On the Mysteries* also provides important information about the work of the *anagrapheis*, although it refers to the second stage of the process, after 403. There is however no reason to believe that the task of the *anagrapheis* in their first term (410-404 BCE) was any different from their work in the second (403-400 BCE; see Canevaro-Harris 2012: 112). Scholars have usually relied on a document preserved in this speech, the decree of Teisamenus (Andoc. 1.83-4), in order to reconstruct the procedures followed in the republication of the laws, but this document is a later forgery and none of the information can be considered reliable (Canevaro-Harris 2012: 110-16). On the other hand, the summary provided by Andocides is a rich source of information that is corroborated and supplements the account we can reconstruct from Lys. 30 and *IG I³ 104*. Andocides (1.81) states that the procedure was an actual examination of laws of Draco and Solon (*dokimasantes*), and that only those that received approval (*kyrothentas*) should be written up and placed in the *stoa*. So Andocides confirms that the republished laws were posted in front of the Stoa of the *Basileus*, as we learned from the prescript of *IG I³ 104*, and

clarifies the approval of the Assembly expressed in the inscription: they were not only republished, they were in fact examined and re-approved, and this was the task of the Assembly, not of the *anagrapheis*.

This process of examination and republication of the laws of the city raises many questions, but also provides answers about the choices and concerns of the restored democracy in 410. The first point is that after the attack by the oligarchs against the fifth-century tacit legislation of the *demos*, and their claims to restore the *patrioi nomoi* against the legal changes of the fifth century, the reality of the inconsistencies in the laws of Athens was too apparent to be ignored. Moreover, a simple return to the previous reality and arrangements was not an option. First, because after the changes made by the Four Hundred and the Five Thousand democracy had to be effectively restored, which required action. Second because the oligarchic revolutions and the ideological justification exploited by the oligarchs had shown that democratic institutions were liable to charges of illegitimacy. The democrats needed therefore to reclaim first of all the laws of Draco and Solon, the *patrioi nomoi* that the oligarchs claimed to be restoring. Second, they needed to deal with the issue of inconsistent legislation, that they had tried to address before with the creation of the *graphe paranomon*. Yet while the *graphe paranomon* dealt with prospective legislation, they had to deal with the problem retroactively, restoring the coherent system of laws that was implicit in their ideology of legislation since the recognition of Solon as the father of the legal order, while at the same time restating the right of the *demos* to rule.

Their solution was conservative and innovative at the same time. Conservative because, once again, they did not introduce any rules of change, nor did they install *nomothetai* to write new laws and change the constitution for the better. They chose

instead to restore the ‘laws of Solon’ (according to Lys. 30.2), and it is possible that originally the task of the *anagrapheis* was believed to be simply that of finding the actual laws of Solon (which were presumably at the time still readable on *axones*) and republishing them in the most visible fashion, at a key point in the *agora*, the central civic setting of the city, in front of the Stoa of the King, on free-standing stelae in an impressive monumental arrangement (for the physical characteristics of the republished laws see Shear 2011: 85-96), in order to reclaim them for the democracy.

Lysias (30.2) remarks that Nicomachus was originally appointed to perform the task in four months, but stayed in office for six years. This may reflect expectations in the city that the task would have been straightforward, the laws would have been found, recognized unequivocally in a short time and promptly republished. But this proved to be unrealistic, because, as we have seen, the situation of the laws of the city, after over a century of tacit legal change and unrecognized innovations, was very inconsistent and much more complex than expected. In particular, the Athenians (and specifically the *anagrapheis*) might have already realized that simply republishing the actual laws of Solon would have brought the city back to a constitutional form that was very different from the arrangements before the oligarchic revolution. So in practice the task had to be understood in a wider sense as pertaining to the republication of the laws of the city in general, to decide what was to be valid and what was not (on this issue see Clinton 1982, Rhodes 1991, Shear 2011: 75-9), and this is why Nicomachus could be accused of adding some laws and deleting others.

This seems to be confirmed by the extant fragments of the republished stelae, which contain among other fragments Draco’s law on homicide (*IG I³ 104*), a composite dossier of laws concerning the Council, presumably from different times

(*IG I*³ 105), and a naval law concerning equipment of triremes and the obligations of trierarchs towards their successors (*IG I*³ 236) which cannot be earlier than the fifth century (on these fragments cf. Dow 1961, Lambert 2002, Shear 2011: 75-96). This is where the process of republication adopts innovative solutions: the Athenians, by republishing these laws, not only recognized statutes from various times as potentially valid, and to some extent, for the first time, differentiated between permanent rules, *nomoi* that were to be republished, and *ad hoc* measures, but created a procedure, although a temporary one, for dealing with inconsistencies among the laws, one that involved an assessment by the Assembly of all laws (entrenched or not, Solonian or not) and a final decision of the *demos* on all of them. Thus, a process that was intended to restore the *patrioi nomoi* ended up with a full series of stelae inscribed with ancient and less ancient laws, some Solonian and Draconian, which were introduced by prescripts that, like in *IG I*³ 104, declared that the *demos* had approved them. While reaffirming the authority of (most) ancient laws of the city, and repealing some others as inconsistent, the Athenians for the first time explicitly recognized that even the laws of Solon and Draco derived their authority not from an oath or an entrenchment clause, but from the vote of the *demos*. This was a momentous event, which would mark the development of legislative procedures in Athens in a democratic direction, despite the fact that the whole process was still intended as temporary, and did not provide any explicit rule of change for the future.

The Athenians restored democracy once again in 403, in the archonship of Eucleides, and they swore not to remember past wrongs (*me mnesikakakein*, an amnesty extended to all but the Thirty themselves and those who had held office under them, whose terms are summarized at [Arist.] *Ath. Pol.* 39.5; cf. recently Joyce 2008; 2014). At that time, we learn from Andocides, they also resumed the process of

republishing their laws and brought it eventually to completion. Yet in addition to continuing with the republication of the laws of Draco and Solon, they elected *nomothetai*, and their election brought about extensive changes in the Athenian legal order, among which a clear-cut distinction between *nomoi* and *psephismata* and precise and comprehensive rules of changes that allowed the laws to be amended at any point. It is important to follow the events of those years carefully. Andocides (1.81) recalls that after the war between the oligarchs and the democrats ended with the reconciliation agreement, the Athenians elected a commission of twenty to govern the city until laws could be enacted, but until then, the *thesmoi* of Draco and the *nomoi* of Solon had to be valid.

It is remarkable that Andocides chooses to use the word *thesmoi*, the original term that defined the laws of the archaic lawgivers. This may indicate that after the extensive changes the Thirty had brought about, and because, as we have seen, they actively destroyed many laws (such as those of Ephialtes and Archestratus), in order to restore some appearance of legal order the Athenians chose to declare temporarily valid only the original laws of Draco and Solon, which had presumably remained mostly untouched. This would also justify why they felt the need to enact ‘new laws’, as Andocides states: they could not simply go back to the *status quo* before the Thirty. Eventually, members of the Council were selected by lot, and the Assembly elected *nomothetai*. Afterwards the Athenians voted to resume the scrutiny of the laws of Draco and Solon started in 410. We are here faced with two separate procedures: one resumes the work of republication of the *anagrapheis*, but the other is the election of *nomothetai* for the explicit purpose of enacting new laws. The format is the usual one, familiar from the nomothetic tradition and the oligarchic revolutions: the most legitimate means to make new laws and modify the constitution is by appointing

special lawgivers which would perform this special task, after which the new laws should not be changed. However, this is the first time we find the democracy using this instrument (the restored democracy in 410 did not appoint *nomothetai*, it simply proceeded to republish the ancestral laws), and the outcome is different from anything we have seen before. Why were these *nomothetai* appointed? First of all, as we have mentioned, to remedy the destruction caused by the Thirty and make it possible to revive the laws of the city in a fashion that would make them workable. Second, because it is likely that many of the existing laws that the *anagrapheis* were about to post once again in front of the Stoa of the King would have made the reconciliation agreement invalid, and brought to justice many for their actions under the Thirty, who were instead to be pardoned under the *me mnesikakein* rule. In fact, most of the new laws that we know these *nomothetai* to have enacted have to do with these two aspects: rules about legislation, and the validity of laws before and after the archonship of Eucleides. In enacting these laws, the *nomothetai* revolutionized legislation in Athens.

Andocides (1.85-9) discusses the laws that were laid down by these *nomothetai*. One of these laws, ordering that ‘all judgments in private suits and in arbitrations rendered during the democracy are to be valid’, provides that only judgments and arbitrations rendered under a democratic regime are to be valid, but not those rendered under the Thirty. The same law is discussed by Demosthenes (Dem. 24.56-7) and is supplemented by a further clause that explicitly states ‘but what was done under the Thirty, or the judgment[s] delivered, whether in private or in public, shall be invalid.’ Andocides mentions another law, which provides that ‘laws are to be enforced from the archonship of Eucleides’. The meaning of this provision is not, as has been sometimes argued, that only laws enacted from the archonship of

Eucleides are to be valid, but rather that the laws cannot be applied to any crime committed before the archonship of Eucleides (see MacDowell 1962: 128-9). This provision was clearly meant to make the reconciliation agreement enforceable, by forbidding any case originating in a wrong committed before 403 to be brought to trial. These few laws deal therefore with the transition from the regime of the Thirty to democracy.

The other laws mentioned by Andocides deal instead with legislation, and are more interesting in this context. The first he mentions is a provision stating that ‘it is not allowed for magistrates to use an unwritten (*agraphos*) *nomos* not even about a single matter’. This provision is sometimes believed to refer to laws that are not republished by the *anagrapheis*, but the opposite of *agraphos* (as Clinton 1982: 34 correctly points out) is *gegrammenos* (‘written’), not *anagegrammenos* (‘posted’, ‘published’, ‘inscribed’). This should be interpreted as a basic rule to be respected in the city: magistrates should perform their task adhering strictly to the instructions of the written laws, and not according to customs, or to any principle that is not explicitly included in the laws of the city. The very enactment of such a law by the *nomothetai* is evidence that they undertook an unprecedented task, that of defining once and for all, from the basics, what are the laws that are to rule the city. Another provision preserved in Andocides is also key in this respect: ‘no decree, neither of the Council nor of the Assembly, is to have more authority than a law’. This law for the first time introduces a clear-cut distinction between *nomoi* and *psephismata*, and a hierarchy between the two, with *nomoi* being rules of a higher level, which can overrule decrees but cannot be overruled by them. This rule effectively put an end to the interchangeable use of *nomos* and *psephisma* that we have remarked for the fifth century, and two pioneering essays by Hansen (1978 and 1979) have demonstrated

that the Athenians throughout the fourth century respected this subdivision and this hierarchy carefully (see below Section 7 for the procedural distinction between the two).

But what is a *nomos*? Fourth-century philosophers are very clear about this: Aristotle in the *Politics* (1292a32-7) points out that laws ought to determine all general matters while magistrates deal with particular cases. In the *Nicomachean Ethics* (1137b13-14) he also states that a law must be put in general terms, and that is why cities also require decrees, which must deal with particular cases. That a law must be general in scope seems to be its key element, and the next law quoted by Andocides (1.89; cf. also Dem. 23.86, 218; 24.18, 59, 116, 188; [Dem.] 46.2) rules exactly this, although in negative terms: ‘It is not permitted to enact a law directed against an individual unless the same law applies to all Athenians’ (cf. Canevaro-Harris 2012: 117-19 and Canevaro 2013: 145-150). The *nomothetai* defined what a *nomos*, as opposed to a *psephisma*, is by forbidding laws for single individuals: laws must have a general content and apply to all Athenians alike. The author of the Pseudo-Platonic *Definitions* (415b) remarks instead that a law must be valid not for a limited time, but forever. This principle reminds us of the nomothetic tradition of legislation, with its focus on the unchangeability of the law and its permanent validity. There is no provision in the extant laws of the *nomothetai* which states this explicitly, although Hansen (1978 and 1979) has shown that in practice fourth-century Athenians stuck also to this rule.

Another law that is likely to belong to the legislative activity of the *nomothetai* of 403 deals on the other hand with time, and provides further directions as to the validity of the *nomoi*. This is the law of Diocles, found as a (reliable) document at Dem. 24.42 (Canevaro 2013: 121-7):

Diocles said: the laws enacted before the archonship of Eucleides under the democracy and those that were enacted in the archonship of Eucleides and have been written up shall be in force. Those enacted after the archonship of Eucleides and enacted henceforth shall be in effect from the day in which each was enacted, except if the time from which one must be in effect is specified. The secretary shall add this provision to the laws now in effect within thirty days; henceforth, whoever happens to be the secretary, shall immediately add that the law is in effect from the day in which it was enacted.

This law defines the time from which particular laws are to be in force. Those enacted before the archonship of Eucleides under the democracy are simply to be in force (the date from which they can be enforced is not an issue, because no laws can be applied to crimes committed before the archonship of Eucleides). The laws *anagegrammenoi* passed in the archonship of Eucleides must also be simply valid, without a starting point. This must reflect the fact that the *anagrapheis* were simply republishing laws (confirmed by the Assembly) that were already in force before their republication, so even if they were republished at a specific point during the archonship of Eucleides, they must be considered in force from beforehand. Finally, any new law passed afterward is to be valid from the day of the enactment (unless the law itself provides for a later starting point). So the law provides that laws cannot be retroactive, and does not assume or mention any time limit in the future. This implies, although it does not state, that laws are supposed to be permanently valid.

7. The introduction of rules of change: the new *nomothesia*

Thus the revolutionary action of the *nomothetai* of 403 gave Athens a clear-cut

distinction between *nomoi* and *psephismata*, eventually embodying in a set of rules the distinction between legislation and day-to-day administration that was implicit in the nomothetic tradition from the beginning. They also provided a clear hierarchy which defined *nomoi* as a higher set of rules that have precedence over *psephismata*. Moreover, the very fact that these specially appointed *nomothetai* found it necessary to make innovations and changes in the law shows that by now the Athenians had come to understand that legal change is necessary, and must be institutionalized. The republication of the laws of Solon had institutionalized to an extent innovation in legislation, by accepting laws passed after the archaic lawgivers and by submitting the ancestral laws of the city to the scrutiny of the *demos*. Now the *nomothetai*, although still formally within the nomothetic tradition (they were after all a specially appointed committee for the purpose of constitutional reform), would proceed to institutionalize legal change, by providing the city with comprehensive rules of change that made it possible for the *demos* to give itself laws, and change previous laws, without disruption of the legal order, but through a precise and completely legitimate procedure (there is wide agreement among scholars that the introduction of the rules of *nomothesia* valid in the fourth century must be attributed to the 403 *nomothetai*; see e.g. Harrison 1955: 26, Hansen 1991: 164; Kremmydas 2012: 24). Through these procedures the distinction between *nomoi* and *psephismata* was further institutionalized, with different paths to enact and repeal decrees and laws.

The evidence for the procedures of legislation that were enacted by the *nomothetai* of 403 and were used throughout the fourth century until 322 is extensive, yet very hard to decipher. The main evidence for this procedure is found in two speeches by Demosthenes, both delivered in the 350s: the *Against Leptines* (20) and the *Against Timocrates* (24), supplemented by a short passage of Aeschines' *Against*

Ctesiphon (3.38.40), which provides information about a later addition to the procedures aimed at fine-tuning its workings. Some further information is provided by a few fourth-century inscriptions, laws and decrees that provide for the enactment of laws (*SEG* 26.72; Stroud 1998; Agora Excavations, inv. no. I 7495 (unpublished); *IG* II² 140; *IG* II² 244; *IG* II³ 320; *IG* II³ 447; *IG* II³ 445; *IEleusis* 138; *SEG* 52.104; *IG* II³ 452, *IG* II³ 327, *IG* II³ 355). Dem. 20 and 24 both discuss extensively the laws concerning the enactment of new laws, and Dem. 24 also preserves documents that purport to contain the actual laws about legislation. Yet these documents are inconsistent with the accounts in the speeches, and have many unacceptable features that show that they are forgeries inserted in the speech at a later date (Canevaro 2013b; *pace* MacDowell 1975; Hansen 1978-9; Rhodes 1984; Hansen 1985, who use these documents in their reconstructions). The reconstruction I provide here does not rely on the forged documents and has the advantage of representing a coherent procedure that is supported by all the remaining evidence (for a full case for this reconstruction see Canevaro 2013b).

There is however a gap in my reconstruction, which I should flag up before summarizing it here: the identity of the *nomothetai*. These are obviously not the same as the ones that enacted this procedure, but rather, as we shall see, *nomothetai* that could be appointed at any point, whenever someone decided to initiate legislation. Scholars have for a long time believed, on the evidence of the forged document at Dem. 24.20-3, that the *nomothetai* were selected from among those who had taken the Judicial Oath, that is from the same pool of men as the judges in the lawcourts. With the recognition that this document is not reliable, we are left with two passages that could give information about the identity of the *nomothetai*: one is Dem. 20.93, which mentions those that have sworn the oath, but is unclear as to whether these are the

nomothetai enacting new laws, or rather the judges that repeal opposing ones (see Canevaro, forthcoming a); the other passage is Aeschin. 3.39, which seems to mean ‘the *prytaneis* shall hold an Assembly labeling (*epigraphēin*) it *nomothetai*’ and therefore to be evidence that the *nomothetai* were in fact a special session of the Assembly (Piérart 2000; *contra* Rhodes believes that *epigraphēin* could also be a way of saying ‘putting *nomothetai* on the agenda’). The evidence is too scanty for a final word, and I prefer here to suspend my judgment. I provide now a summary of my findings, which should shed light on the momentous innovations introduced by the *nomothetai* elected in 403.

The procedure they created worked as follows: 1) in order to introduce a new law, a *probouleuma* (a preliminary decision; cf. Rhodes OHAGL) had to be approved by the Council, introducing a vote in the Assembly about whether new laws could be proposed; 2) following the *probouleuma*, a preliminary vote in the Assembly, at any point of the year, had to be held that would allow new laws to be proposed (Dem. 24.25; *IG* II² 333, *IG* II³ 320, *IG* II² 140); 3) once new proposals had been authorized by the Assembly, all new proposals had to be posted in front of the monument of the Eponymous Heroes (Dem. 24.25; 20.94), so that anybody could see them (the monument of the eponymous heroes was a series of statues in the Agora representing the eponymous heroes of the ten Athenian tribes, which served as a public board of the Athenian state); 4) the bills had to be read out by the secretary in each Assembly until the appointment of the *nomothetai*, to allow everyone to make up their minds (Dem. 20.94); 5) in the third Assembly after the preliminary vote, on the basis of the proposals submitted, the people had to discuss the appointment (or summons) of *nomothetai* and pass a decree of appointment (or summons; Dem. 24.25; 20.92); 6) opposing laws however had to be repealed before the new laws could be enacted by

the *nomothetai* (Dem. 24.32, 34–5; Dem. 20.93); Dem. 20.93 (and *passim*) suggests that the correct forum for repealing opposing laws was a lawcourt (see Canevaro, forthcoming a); 7) presumably at the same meeting of the Assembly that appointed the *nomothetai*, expert *synegoroi* were elected to defend those laws whose repeal was necessary for enacting the new laws (Dem. 24.36; 20.146); 8) if the proposer of a new law failed to abide by any of these provisions, anyone could bring him to trial through a *graphe nomon me epitedeion theinai* (a public charge for enacting an inexpedient law; Dem. 24.32), and if the case was heard within a year after the enactment of the law, the punishment could be anything the court decides, from a small fine to *atimia* or death.

The creation of the new distinction between laws and decrees, of the new procedure of *nomothesia*, and of the *graphe nomon me epitedeion theinai* (the public action against inexpedient laws) to be used to repeal *nomoi*, also changed the scope of the old *graphe paranomon*. The two procedures were superficially similar, and the *graphe nomon me epitedeion theinai* followed the same procedure as we have described in Section 5 for the *graphe paranomon*. Yet with the introduction of the distinction between *nomoi* and *psephismata* the *graphe paranomon* partially changed its role, and could no longer be used against any enactment, but only against decrees. Conversely the *graphe nomon me epitedeion theinai* was reserved for *nomoi*, and could presumably be used both against laws just enacted or proposed (in which case, if the case came to court within a year, the proposer was liable to punishment), or to repeal older laws before enacting a new one before the *nomothetai* (cf Dem. 20.93 and in general the situation in the speech; see Canevaro, forthcoming a; *contra* Hansen 1978-9; Rhodes 1984; Hansen 1985), in which case the law was defended by *synegoroi* (or *syndikoi*) elected by the Assembly. Despite the different names of the

two public charges, which seem to suggest for the first a focus on legal matters (whether a decree is against the laws) and for the second a focus on matters of political interest (*to sympheron*) more akin to those treated in a deliberative setting, studies of the arguments used in both kinds of charge have shown that the terminology was purely intended to distinguish the two procedures from one another, yet *nomoi* are often accused of *paranomia* (illegality), and the scope of a *graphe paranomon* often is not limited to the strict inconsistency with existing laws, and touches also on questions of political interest (cf. Quass 1971: 27; Rubinstein 2000: 42-3 n. 48; Kremmydas 2012: 49; this is not to say that the only relevant considerations in cases of *graphe paranomon* were political, and the action was meant to be used as an instrument of political feuding, *pace* Yunis 1988). The term *epitedeios* (inexpedient) itself seems to have in *graphai nomon me epitedeion theinai* a semantic range that covers anything from ‘unsuitable’ and ‘inexpedient’ to ‘unconstitutional’ (cf. *LSJ* s.v.: ‘that does not fit’). And in fact, the sources show that in both instances the plaintiff presented by the accuser in bringing the charge (cf. Harris 2013b: 114-27, Canevaro, forthcoming a and Canevaro OHAGL on legal procedure) had to quote the actual laws that the new bill contradicted (cf. Harris 2013a: 121-2). The two terms (*paranomon* and *epitedeion*) therefore do not mark a distinction in terms of argumentative focus, but rather flag up a substantive difference between the two charges: *graphai paranomon* indict *psephismata* that are inconsistent with the *nomoi*, while *graphai nomon epitedeion theinai* indict *nomoi* that are inconsistent with other *nomoi* and therefore endanger the coherence of the legal order as a whole (or *nomoi* that are going to be inconsistent with other *nomoi* once these are enacted by the *nomothetai*).

Upon examining these complex procedures, it is immediately clear that they

do not make enacting new laws, or changing existing ones, very easy. They require many procedural steps, before the Council, the Assembly, the lawcourts and finally the *nomothetai*, and set a very clear timetable. Yet these hurdles are not more complex or time-consuming than those set by modern constitutions for the enactment of laws, let alone constitutional laws, and do not seem to be conceived to discourage legislation, but simply to regulate it. These rules are veritable rules of change that provide any Athenian who wishes with a clear procedure for enacting or changing legislation. In sections 4 and 5 we summarized the various options advocated in Athens for solving the issues caused by the dissonant system of legislation of the fifth century. We isolated a conservative option: only the laws founded on the authority of specially appointed lawgivers are valid and legitimate, and no legal change is allowed; a middle-ground option: enactments of the *demos* are valid, as long as they do not contradict ancestral laws, any entrenched enactment, and any other enactment that has not been repealed in advance, yet no change of the ancestral laws and entrenched enactments is allowed; and finally an extreme option, which one could connect with extreme democrats: in the words of Pericles (Xen. *Mem.* 1.2.42), ‘Laws are all the rules approved and enacted by the majority in assembly, whereby they declare what ought and what ought not to be done’. For most of the late fifth century the solutions pursued were the first or the second: oligarchs tried to enforce through revolution the absolute unchangeability of the ancestral laws, and rejected the legitimacy of anything else, while democrats, with the *graphe paranomon* and the republication of the laws of 410-404, accepted the validity of the enactments of the *demos*, but refused to allow and institutionalize legal change, and actively discouraged it with the *graphe paranomon*. It is then all the more remarkable that the solution chosen by the *nomothetai* appointed in 403 is in fact the extreme one,

because the creation of such rules of change gives any Athenian who wishes the right to propose or amend a law at any point, and have his proposal assessed by his fellow citizens (whether the *nomothetai* were judges, a special Assembly or a committee appointed for the purpose of enacting laws, they were still an ordinary group of Athenians acting on the authority of the *demos*). Before this date there was no legitimate way to change a law of the city; laws were believed to be unchangeable. The existence of tacit legal change despite the rules and ideology of legislation does not change this basic fact, and one should moreover consider the many attempts democrats and oligarchs made in the fifth century to discourage it and prevent it. It is therefore all the more paradoxical that the introduction of rules of change in Athens has been interpreted by many historians, as we have seen in Section 1, as a limitation of the sovereignty of the people, when it is in fact the first time in which the right of the *demos* to introduce new laws and change old ones is explicitly recognized, institutionalized and regulated.

Yet, however revolutionary the reform of legislation introduced by the *nomothetai* of 403 is, it was not a complete break from the nomothetic tradition of legislation which originated with Solon and the Athenian understanding of his action. Solon had attempted to separate legislation from administration but had not devised a democratic procedure for altering or revising his laws. The reforms of 403 retained his distinction between administration and legislation by creating different procedures for enacting decrees (*psephismata*) about public business and laws (*nomoi*) but provided a democratic procedure for altering laws in an orderly fashion. We should explain this institutional change as a development that is, to use the terminology of New Institutionalism, path-dependent, and is influenced by previous institutional and ideological arrangements. Even while rejecting the two principles, key to that

tradition, that laws are unchangeable and that legislation is not the province of the *demos*, the Athenians still managed to salvage much of the tradition that expressed those principles. The new revolutionary arrangement incorporates many of the concerns that that tradition expressed. In particular, although making and changing laws is now possible at any point of the year, laws do not merge with the ordinary business of the Assembly. The very distinction between *nomoi* and *psephismata* is predicated on the principle that laws are different from administration, the very principle that in its most inflexible formulation is rejected with the creation of the new *nomothesia*. Likewise, the many institutional stages one has to go through in order to pass legislation are designed to prevent ‘frivolous’ legislation, that is the enactment of inexpedient laws on the spur of the moment by an emotional Assembly. These hurdles, and the requirement that one should repeal opposing laws before enacting a new one, or else be liable to a dangerous *graphe nomon epitedeion theinai*, and the availability of further judicial review for enacted *nomoi*, are moreover designed to preserve the coherence of the laws of the city. Far from limiting the power of the Assembly, the new rules enabled the Assembly to speak with one clear voice, not a cacophony of inconsistent rules. Average citizens could only understand their rights and duties if the Assembly gave them a comprehensive and coherent set of instructions (Dem. 20.90-93). Avoiding the existence of inconsistent laws at the same time is important to secure predictability for the litigants, but this concern for the internal coherence of the laws of the city is not new: it springs directly from the understanding of the laws of the city as a unitary whole which reflects the rational intention of an original lawgiver. This principle, opportunely modified, is also incorporated into the new institution. The *nomothesia* created after the restoration of democracy in 403 and in force in the fourth century is the result of the interplay

between revolutionary choices and beliefs like the full sovereignty of the *demos* and old concerns typical of a tradition of legislation which dates back over 200 years.

8. Legislation in the fourth century

The Athenians during the fourth century stuck to the rules of change created in the aftermath of the democratic restoration to an impressive extent. In a 1978 article Hansen has surveyed all the extant decrees of the Assembly and found no examples of general rules valid forever, *nomoi* according to the distinction introduced at the end of the fifth century, which were enacted by the Council or the Assembly (the only possible exceptions are dated to the years 340-38, right before and after the battle of Chaeronea, when Athens was in danger of defeat and destruction, and therefore correct procedure was occasionally dropped when emergency measures were necessary). Hansen surveyed some 500 *psephismata* of the Assembly preserved epigraphically, and could not find any examples of rules that should have been passed as *nomoi* before 322. Conversely, he discussed six *nomoi*, and none of these was passed by the Assembly. The distinction is in the very motion and enactment formulas of the enactments: while the *psephismata* are introduced by formulas such as ‘it was resolved / it should be resolved by the people / by the Council’ (*edoxe / dedochthai toi demo / tei boulei*), *nomoi* never make any reference to the Assembly or the Council, but either state that the enactment is a *nomos*, or have formulas such as ‘it was resolved / it should be resolved by the *nomothetai*’ (*edoxe / dedochthai tois nomothetais*).

We now have ten fourth-century laws on stone from Athens, and all conform to this description (*SEG* 26.72; Stroud 1998; Agora Excavations, inv. no. I 7495

(unpublished); *IG II²* 140; *IG II²* 244; *IG II³* 320; *IG II³* 447; *IG II³* 445; *IEleusis* 138; to these one should add *SEG* 52.104 = Themelis 2002, which has been sometimes dated to the third century, but should be dated instead to the second half of the fourth, cf. Canevaro 2013c; and the document at Dem. 24.63, which is a reliable document preserving a law enacted by *nomothetai*, cf. Canevaro 2013: 151-7). The only apparent exceptions to this rule are three honorary decrees of the Assembly (*IG II³* 452, *IG II³* 327, *IG II³* 355, cf. also Dem. 24.27 with Canevaro 2013: 104-13) that order that certain sums for the purpose of funding particular honours should be assigned to a particular treasurer at the next session of the *nomothetai*. In such cases it is clear that the enactment that the *nomothetai* would be required to pass was not a general rule valid forever, so at first sight would have been more appropriately passed as a decree. Yet the rationale for such cases is clear: the allocation of the funds of the city, the budget, was a fixed one in Athens, regulated by the *merismos*, which was a permanent law, not a decree. If any change to the *merismos* was required to free or reassign particular sums, in accordance with the rule that no *psephismata* could take precedence over a *nomos*, the only option open to the Athenians was to change the *nomos* about the *merismos*. So this apparent infraction of the rules established at the end of the fifth century is rather a good case of strict conformity to those rules. Permanent rules of general scope were indeed enacted in the fourth century by regular meetings of the *nomothetai*, and not by normal Assembly meetings, and the evidence of inscriptions shows that the distinction between *nomoi* and *psephismata* was upheld.

It also appears that the multiple hurdles did discourage frivolous legislation, as we have around 500 extant decrees on stone but, as we have seen, only around ten *nomoi*. These data however should not be interpreted as evidence that the procedure did in fact discourage legislation altogether (*pace* Hansen 1974: 46-7). It is perfectly

normal that new general permanent rules should be necessary much less often than decrees dealing with the day-to-day administration of the *polis*. And we should also account for the influence of the epigraphic habit on the publication of laws and decrees on stone, because we know that not everything was inscribed (cf. Sickinger 1998). The very high number of extant decrees results from the fact that all honorary decrees were usually published, and these form the majority of *psephismata* in our records. Dem. 24.142, admittedly in a passage in which he is accusing the Athenians of legislating too much, states that they did so almost once a prytany, that is, almost ten times a year. Allowing for rhetorical exaggeration, we could perhaps halve this figure, but we would still be left with five sessions of *nomothetai* a year, each of which could and presumably did deal with multiple legislation proposals. It is easy to see how someone arguing for repealing new laws could represent this as an excessive amount of legislation. Apart from inscriptions, our main evidence for legislative procedures in the fourth century is provided by speeches delivered in *graphai paranomon* and *graphai nomon me epitedeion theinai*. In our sources we find mention of 35 *graphai paranomon* (Hansen 1991: 208 gives this figure, which corrects the previous catalogue, Hansen 1974, which reported 39 cases), against only six *graphai nomon me epitedeion theinai*. This seems to confirm the impression given by inscriptions that *psephismata* were much more numerous than *nomoi*, yet it should be pointed out (*pace* Hansen 1991: 176) that the ratio is much less extreme: 10 against almost 500 in inscriptions (one in fifty), 6 against 39 in literary sources (approximately one in six). This may suggest that laws were enacted and changed more usually than inscriptions suggest, and at the same time, that they were more promptly indicted after their enactment.

Of course, procedural infractions happened, and gave rise to abundant

criticism, which sometimes resembled in its arguments the objections against legal change *tout court* usual in the fifth century. The most notable case we know of is that about the law of Timocrates: this new law, introduced in 354/3, allowed public debtors who failed to pay back their debt in time to avoid prison if they could present sureties. Against this law, which had just been enacted, a certain Diodorus (whose speech was written by Demosthenes, Dem. 24) immediately brought a *graphe nomon me epitedeion theinai*. According to Diodorus' speech, Timocrates enacted this law for the sole purpose of saving Androtion, a famous politician and an associate of Timocrates, from imprisonment. In enacting the law, he did not respect the prescribed times for legislating: he was authorized by the Assembly to propose legislation, and forced the appointment of the *nomothetai* to the very next day (instead of waiting for the third meeting of the Assembly, see above Section 7), at which meeting the law was approved. Diodorus has documents read out to support his charge, so this is likely to be true, yet we should note that because of these infractions Timocrates was liable to a public charge, which was immediately brought against him. We do not know how the trial ended, but it is evidence that the multiple checks of legislation worked.

In the speech *Against Leptines* (20.91-2), for another *graphe nomon me epitedeion theinai* brought in 355/4 by Apsephion, Phormion and Demosthenes against a law that made most tax-exemptions illegal, Demosthenes refers to the rules of change discussed at Section 7 as 'the old law', from which Leptines has deviated in enacting his law. He claims that when these rules (which he anachronistically attributes to Solon) were followed, people used the existing laws and did not enact new ones, whereas now some politicians, who have acquired great power, manage to legislate however they want. As a result, there are plenty of contradictory laws and laws resemble decrees, and are in fact often more recent than the decrees to which

they should conform. Diodorus at Dem. 24.142 also speaks along these lines when he claims that *rhetoires* legislate almost every month, and they repeal the laws of Solon, which were enacted by the ancestors, and replace them with their own. These statements have been too often taken at face value (see e.g. Kahrstedt 1938: 12-18; Harrison 1955: 26-35; Ehrenberg 1960: 57), but we should keep in mind that they all come from speeches delivered for the purpose of repealing new laws as not *epitedeious* (expedient).

In the *Against Leptines* Demosthenes exaggerates when he argues that, as long as the Athenians followed the rules of change laid down after the restoration of democracy in 403, they did not enact new laws. We have in fact epigraphical evidence of laws enacted by the *nomothetai* before 355. Likewise, when he claims that in his time *rhetoires* manage to legislate however they want to, he is not referring to actual reforms of *nomothesia* (which would have abolished what he calls ‘the old law’), but simply to bad practices. Against his account goes the very fact that Leptines’ law had indeed been enacted by the *nomothetai* according to the old law, as Demosthenes has to admit (20.94), and moreover the result of the trial, which repealed Leptines’ law, is evidence that if procedural violations occurred, the decision of the *nomothetai* was actually later reversed in court (see Harris 2008: 20-1 and Kremmydas 2012: 58-69). The accusation that laws are merging into decrees is also not supported by the epigraphical evidence, which shows that they were clearly distinguished all the way down to 322, and by the fact that Leptines’ law itself was approved by the *nomothetai*, and was certainly a permanent general rule, as was the law of Timocrates (despite Diodorus’ claim that its real intention was to save Androtion).

As for Diodorus’ accusations in the *Against Timocrates* that the Athenians

legislated too much, the epigraphical and literary evidence shows that they passed far fewer laws than decrees. Of course, they did legislate, and the new laws could still be represented when needed as too many, and the nomothetic ideology (which to an extent was still alive and underlined the new practices) provided the orators with abundant material against new laws just enacted that could come in handy in the new institutional context. And yet what should be stressed are the differences: Diodorus complains that the laws of the ancestors are repealed all the time, yet he never claims that this is illegitimate. In fact, he is witness to the fact that legal change does legitimately happen. He just claims that excessive legal change is undesirable, in the same way as Demosthenes does in the *Against Leptines*. These passages employ argumentative strategies that bear a resemblance to fifth-century arguments delegitimizing legal change, but they are mainly instrumental, and should be read in their particular rhetorical contexts. They are moreover countered by opposing claims in the orators that praise the procedure of legislation and the level of adherence to the laws (cf. Aeschin. 1.177-8, [Dem.] 25.20-4, Lyc. 1.4). As Hansen points out (1991: 177), ‘our picture of [fourth-century] *nomothesia* in Athens would certainly be very different if it were the defence speeches that had come down to us and the prosecution’s speeches that were lost’. We would have in that case litigants vindicating the necessity and desirability of the particular legal change they are proposing, in a fashion that was unknown in the fifth century outside theoretical reflections.

But one theme is repeatedly stressed in the extant speeches for charges brought under the public procedure against inexpedient laws (*graphe nomon me epitedeion theinai*), and on which Demosthenes always concentrates much more extensively than on the undesirability of excessive legal change: the need for

preserving the coherence of the laws of the city. He argues that various provisions of the laws he indicts are inconsistent with previous laws that the defendant failed to repeal, and often argues more widely that the law is unacceptable because it betrays the overall spirit of Athenian laws, predicated on the intention and rationality of the lawgiver (Harris 2007: 365-7). This concern is so central in our sources that we can confidently assume that the same focus would have been expressed in defence speeches for new laws, on the grounds that the new law is in fact consistent with the laws of the city. And this concern about the existence of inconsistent laws, as is expressed by Diodorus (at Dem. 24.142), should be taken seriously, because despite all the checks and hurdles imposed on legislation, the fourth-century *nomothesia* procedure that we have described had the final stage, the judicial review of the new law, still dependent on the willingness of volunteers, which must have made it less than perfectly effective. In fact, that this was not simply an instrumental argument used by the orators in prosecution speeches is demonstrated by the fact that we have evidence of institutional innovations aimed at solving exactly this issue. Demosthenes (20.91) mentions that commissioners were elected specifically to inspect the existing laws and find contradictions, and Aeschines (3.38-9), around twenty-five years later, mentions the same task as one entrusted to the *thesmothetai* (it is unclear whether the task was transferred to them at some point, as MacDowell 1975: 72 and Rhodes 1984: 60 believe, or commissioners and *thesmothetai* worked together, as Hansen 1985: 356 believes). The same concern is attested epigraphically: the law of Nicophon (*SEG* 26.72, l. 55-6) shows that the texts of contradictory laws were destroyed when a new law was enacted.

Despite all these checks however, and as Demosthenes correctly (yet excessively) remarks, it is a fact that in the fourth century laws could be enacted by

anybody at any time, pending the approval of his fellow citizens. Legal change happened several times every year; it was fully legitimate and institutionalized; and it was within the powers of the *demos*. It is therefore understandable that Aristotle should consider fourth-century Athenian democracy as the most extreme form of democracy (Arist. *Pol.* 1298b13-15), one in which the *demos* is master over the laws. His remark at 1292a1-7 that in an extreme democracy (and Athens is for Aristotle an extreme democracy), as the *plethos* and not the laws are sovereign, decrees have higher validity than laws, does not describe fairly the Athenian institutional arrangement. Yet it reflects criticism of legislative practices (and of their use by *rhetoires*) that are detectable also in Demosthenes (e.g. Dem. 20.92). Such a point of view is predicated on the belief, which Aristotle makes clear at 1269a12–a20 (cf. also Pl. *Pol.* 297e), that:

[...] even some of the written laws may with advantage not be left unaltered. For just as in the other arts as well, so with the structure of the state it is impossible that it should have been framed aright in all its details; for it must of necessity be couched in general terms, but our actions deal with particular things. These considerations therefore make it clear that it is proper for some laws sometimes to be altered. But if we consider the matter in another way, it would seem to be a thing that needs much caution. For when it is the case that the improvement would be small, but it is a bad thing to accustom men to repeal the laws lightly, it is clear that some mistakes both of the legislator and of the magistrate should be passed over; for the people will not be as much benefited by making an alteration as they will be harmed by becoming accustomed to distrust their rulers. (Trans. adapted from Rackham)

Aristotle understands that laws may occasionally have to be changed, but seems to believe that in extreme democracies, as the *plethos* has authority over legislation,

changes are made too lightly, while in general laws should not be changed. Likewise, according to the reconstruction we have given, the *Constitution of the Athenians* ([Arist.] *Ath. Pol.* 41) is basically correct when it identifies fourth-century democracy as the one in which most power is with the *demos* ‘for the people has placed itself in control of everything and administers everything through its decrees and its courts, in which the people holds the power’ (Harris, forthcoming a). These are accurate, yet somewhat hostile, assessments of the reality of Athenian fourth-century legislation, when legal change has eventually entered the remit of the powers of the people. As the sources for legislation in the fourth century BCE reveal, however, the people appear to have used their powers responsibly, not passing large numbers of laws.

Fourth-century *nomothesia*, both in its formal institutional arrangement and in the practices it gave rise to, is a truly remarkable achievement, all the more so as it sprang out of the contradictions and eventually the negotiation between institutions and an ideology that denied legal change and the rising conception of the sovereignty of the people. It is remarkable how closely the rules about *nomothesia* conformed to modern theories about the requirements of the rule of law when it comes to legislation. In his discussion of the ‘rule of law’ when applied to legislation, Raz 1977 lists four main requirements: 1) proactive rather than retroactive legislation, which we have seen was covered by one of the laws enacted after the restoration of democracy in 403, 2) laws that are stable, which is guaranteed by all the checks and the hurdles of the new *nomothesia* procedure, 3) clear procedures and rules for making laws, that is clear rules of change, 4) courts having the power of ‘judicial review’ over the way in which the other principles are implemented, which is guaranteed by the creation of the *graphe nomon me epitedeion theinai* (the public action against inexpedient laws). This system of legislation, which guaranteed popular sovereignty and legal change in

an unprecedented fashion while also safeguarding the rule of law, was never challenged by oligarchs, and gave Athens unprecedented constitutional stability. It had to give way 80 years later only following Macedonian invasion and control.

9. Afterword: *nomothesia* under the Macedonians

To prevent this account from becoming too teleological, with institutional change leading inexorably toward the creation of rules of change that at the same time safeguarded the rule of law, this chapter will end with a few words about the aftermath of the Lamian war and the breakdown of fourth-century *nomothesia* (for a full discussion of these developments see Canevaro 2013c).

When the Macedonian general Antipater, after the battle of Crannon in 322 BCE which ended the Lamian War, imposed his peace conditions on the Athenians, the Assembly had to agree to restrict the number of the citizens with full rights to 9000 (Diod. 18.18.3-4), which must have forced the city to adopt extensive institutional changes in order to guarantee its smooth functioning. Among these changes, *Suda* (*s.v.* Demades) informs us that the lawcourts were dissolved. Whether this piece of information is reliable or not, the reduced number of citizens must have forced serious changes in the *graphe paranomon* and *nomon me epitedeion theinai*, and heavily conditioned their workings. But more generally, the sources attest enormous institutional innovations for this period, which are unlikely to have all gone through the checks and hurdles of *nomothesia*. It is more likely that *nomothesia* was either repealed or ignored.

Following the edict of Polyperchon, the Athenians went back to democracy in 318, and it is possible that they returned to the *status quo*, but as early as the summer

of 317 the peace treaty with Cassander had appointed Demetrius of Phalerum in charge of Athens and imposed a timocratic constitution (Diod. 18.74.3-11). During the ten years of his rule, Demetrius acted as a *nomothetes*, reforming many of the laws of Athens, and it is likely that he was actually appointed to such a position (see Canevaro 2013c: 63-6 with previous scholarship). So he inscribed his action within the old nomothetic tradition, and constructed his rule as a constitutional phase, and his role as that of a specially appointed *nomothetes* along the lines of Solon and Draco. Old traditions, by now over 300 years old, could still be used at this date to give legitimacy to radical constitutional reform, as they had in the late fifth century. The creation by him of a board of *nomophylakes* (guardians of the laws) (see Bearzot 2007 and Canevaro 2013c: 66-9 for discussions of this magistracy with previous bibliography), a typically aristocratic magistracy, who sat together with the *proedroi* in the Assembly and the Council and had the power to block new legislation, also shows that Demetrius had a view of the laws as unchangeable by the Assembly, or at least, consistently with Aristotle's contention, as changeable only with great care and rarely. These institutions are strong evidence that nothing resembling the *nomothesia* in force from 403 to 322 existed during Demetrius' rule.

In 307 Athens was 'freed' by Demetrius Poliorcetes, and Diodorus (20.45.5, 46.3) states that the *demos* regained its freedom and the *patrios politeia*. Once again, late-fifth century terminology is used, but Plutarch (*Demetr.* 10.2) makes it clear that with *patrios politeia* the Athenians in this case meant democracy. In order to restore democracy the *demos* had to undertake active legislation to undo the changes brought about by Demetrius of Phalerum. At this point we have the latest occurrence of *nomothetai* in Athens, yet a careful scrutiny of the sources shows that these were not the same as the ordinary *nomothetai* appointed many times a year before 322. They

were rather, once again according to the old nomothetic tradition, a special committee whose job was to propose new laws for the city, to be then approved by the Assembly (Canevaro 2013c: 69-79). These new laws were then to be inscribed by a special *anagrapheus ton nomon* (recorder of the laws) (IG II² 487). Their role was therefore akin to that of the 403 *nomothetai*. We have some parallels for such committees, *nomothetai* or *nomographoi*, imposed by the Antigonids, and by other Hellenistic monarchs, in various conquered cities in these years (e.g. *Chios* 32 = *RO* 84; *Teos* 59). A fragment of Alexis' *Hippeus* (fr. 99) presupposes a strong connection between the *nomothetai* and Demetrius Poliorcetes and strongly suggests that these *nomothetai* were to some extent controlled (or at least perceived to be controlled) by Demetrius. Their creation at the same time is consistent with the nomothetic tradition, and exploits ideological models that have a long history, yet ultimately in order to legitimize external control over the city.

It is not surprising therefore that after Demetrius Poliorcetes was expelled from Athens in 301 we never hear again of *nomothetai*. The term is found in an inscription (*SEG* 37.89 = Themelis 2002), which is often dated to the third century or early second but should be dated instead to the fourth century BCE (Canevaro 2013c: 79-80 with Rhodes in Lambert 2007: 80 n. 38). It is likely that while the institutional memory of the workings of fourth-century *nomothesia* had partially faded by then, the very term *nomothetai* had acquired associations that connected it to foreign control, after the use the two Demetriuses made of it. No literary or epigraphical evidence fully discloses how the Athenians legislated from then on, but it is likely from the absence of any mention of *nomothetai* that the Athenians simply legislated in the Assembly, without separate procedures. This final development was clearly a step backwards because the Athenians lost various procedural checks that had secured the

conformity of their legislation to the rule of law. On the other hand, it was consistent with a path that had led from legislation as the irreversible action of special *nomothetai* to the progressive growth of the sovereignty of the people, who eventually reserved legislation for themselves, and finally got rid of any limitation on their full power to pass laws. On the other hand, some of the results of the innovative phase of 403 remained. In particular, the terms *nomoi* and *psephismata* retained separate meanings (cf. their use side-by-side in the third century in honorary decrees: e.g. *IG* II² 404, 674, 776, 1006, 1028), and enacting *nomoi* remained a distinctive activity (e.g. *Agora* 16.261.1, honorary decree, praises a politician for enacting expedient laws). Their use was eventually extended to enactments not of the *polis*, but of private entities such as *gymnasias* and religious associations, which distinguished between general permanent rules, *nomoi*, and *ad hoc* decisions, *psephismata* (cf. Arnaoutoglou 2003: 128-9).

Bibliography

- Arnaoutoglou, I. N. (2003), *Thusias heneka kai sunousias. Private religious associations in Hellenistic Athens*. Athens.
- Atkinson, K. M. T. (1939), 'Athenian legislative procedure and revision of laws', *Bulletin of the John Rylands Library* 23: 107-150.
- Bearzot, C. (2007), 'I nomophylakes in due lemni di Polluce (VIII 94 νομοφύλακες e VIII 102 οἱ ἑνδεκα)', in C. Bearzot, F. Landucci and G. Zecchini (eds.), *L'Onomasticon di Giulio Polluce: tra lessicografia e antiquaria*. Milano: 43-68.
- Blok, J. and Lardinois, A. P. M. H. (2006). *Solon of Athens: new historical and philological approaches*. Leiden.

- Camassa, G. (2011), *Scrittura e mutamento delle leggi nel mondo antico: dal Vicino Oriente alla Grecia di età arcaica e classica*, Roma.
- Canevaro, M. (2013), *The Documents in the Attic Orators: Laws and Decrees in the Public Speeches of the Demosthenic corpus*. Oxford.
- Canevaro, M. (2013b), 'Nomothesia in Classical Athens: what sources should we believe?', *CQ* 63/1: 1-26.
- Canevaro, M. (2013c), 'The twilight of *nomothesia*. Legislation in early-Hellenistic Athens (322-301)', *Dike* 14 (2011): 55-85.
- Canevaro, M. (forthcoming a), 'The Procedure of Demosthenes' *Against Leptines*: How to Repeal (and Replace) an Existing Law', *JHS*.
- Canevaro, M. (forthcoming b), 'Laws Against Laws: the Athenian Ideology of Legislation', in C. Carey, I. Giannadaki, B. Griffith-Williams (eds.). *Use and Abuse of Law in the Athenian Courts*. Leiden.
- Canevaro, M., and Harris, E. M. (2012), 'The Documents in Andocides' On the Mysteries', *CQ* 62/1: 98–129.
- Carawan, E. (2002), 'The Athenian amnesty and the "scrutiny of the laws"', *JHS* 122: 1-23.
- Carawan, E. (2013), *The Athenian Amnesty and Reconstructing the Law*. Oxford.
- Clinton, K. (1982), 'The nature of the late fifth-century revision of the Athenian law code', in *Studies Vanderpool, Hesperia* Suppl. 19: 27-37.
- Davis, G. (2011), 'Axones and kyrbeis. A new solution to an old problem'. *Historia* 60: 1-35.
- Ehrenberg, V (1960), *The Greek State*. Oxford.
- Gagarin, M. (2008), *Writing Greek Law*. Oxford.

- Halpérin, J.-L. (2009), 'The Concept of Law: A Western Transplant?', *Theoretical Inquiries in Law* 10/2: 333-54.
- Hansen, M. H. (1974), *The Sovereignty of the People's Court in the Fourth Century B.C. and the Public Action against Unconstitutional Proposals*. Odense.
- Hansen, M. H. (1978), 'Nomos and Psephisma in Fourth-Century Athens', *GRBS* 19: 315-30.
- Hansen, M. H. (1979), 'Did the Athenian Ecclesia Legislate after 403/2 BC?', *GRBS* 20: 27-53
- Hansen, M.H. (1980), 'Athenian *Nomothesia* in the Fourth Century B.C. and Demosthenes' Speech Against Leptines', *C&M* 32: 87-104.
- Hansen, M.H. (1985), 'Athenian *Nomothesia*', *GRBS* 26: 345-371.
- Hansen, M.H. (1989), 'Solonian Democracy in Fourth-Century Athens', *C&M* 40: 71-99.
- Hansen, M. H. (1990), 'Diokles' law (Dem. XVI 42) and the revision of the Athenian corpus of laws in the archonship of Eukleides', *C&M* 41: 63-71.
- Hansen, M. H. (1991), *The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology*. Oxford.
- Harrison, A. R. W. (1955), 'Law-Making at Athens at the end of the fifth century B.C.', *JHS* 75: 26-35.
- Harris, E. M. (1990), 'The constitution of the Five Thousand', *HSCP* 93: 243-80.
- Harris, E. M. (1997), 'The Constitution of the Five Thousand', *ZPE* 116: 300.
- Harris, E. M. (2006), *Democracy and the Rule of Law in Classical Athens: Essays on Law, Society, and Politics*. Cambridge and New York.

- Harris, E. (2007), 'Did the Athenian Courts Attempt to Achieve Consistency? Oral Tradition and Written Records in the Athenian Administration of Justice', in C. Cooper (ed.). *The Politics of Orality*. Leiden: 343-370.
- Harris, E. M. (2008), *Demosthenes. Speeches 20–22*. Austin, TX.
- Harris, E. M. (2013a), *The Rule of Law in Action*. Oxford.
- Harris, E. M. (2013b), 'How to Address the Athenian Assembly: Rhetoric and Political Tactics in the Debate about Mytilene (Thuc. 3.37.50)', *CQ* 63/1: 94-109.
- Harris, E. M. (2014), 'Nicias' Illegal Proposal in the Debate about the Sicilian Expedition', *Classical Philology* : 109.1: 66-72.
- Harris, E. M. (forthcoming a), 'From Democracy to the Rule of Law?', in C. Tisch. (ed.). *Athenische Demokratie im 4. Jh. – zwischen Modernisierung und Tradition*. Stuttgart.
- Harris, E. M. (forthcoming b), 'The Authenticity of the Document at Andocides, *On the Mysteries* 95-98'.
- Hölkeskamp, K.-J. (1999). *Schiedsrichter, Gesetzgeber und Gesetzgebung im archaischen Griechenland*, Stuttgart.
- Hölkeskamp, K.-J. (2002), 'Nomos, Thesmos und Verwandtes. Vergleichende Überlegungen zur Konzeptualisierung geschriebenen Rechts im klassischen Griechenland', in D. Cohen and E. Müller-Luckner, *Demokratie, Recht und soziale Kontrolle im klassischen Athen*. München: 109-14.
- Hölkeskamp, K.-J. (2005), 'What's in a code? Solon's laws between complexity, compilation and contingency', *Hermes* 133: 280-93
- Jacoby, F. (1949), *Atthis: the local chronicles of ancient Athens*. Oxford.
- Joyce, C. J. (2008), 'The Athenian Amnesty and the Scrutiny of 403', *CQ* 58: 507-18.

- Joyce, C. J. (2014), 'Μὴ μνησικακεῖν and "all the laws" (Andocides *On the Mysteries* 81-2): A Reply to E. Carawan', *Antichthon* 48: 1- 14.
- Kahrstedt, U. (1938), 'Die Nomotheten und die Legislative in Athen', *Klio* 31: 1-25.
- Kallet-Marx, L. (1989), 'The Kallias Decree, Thucydides, and the Outbreak of the Peloponnesian War', *CQ* 39/1: 94-113.
- Kremmydas, C. (2012). *A Commentary on Demosthenes' Against Leptines*. Oxford.
- Krentz, P. (1982), *The Thirty at Athens*. Ithaca, N.Y.
- Lambert, S. (2007), 'Athenian State Laws and Decrees, 352/1–322/1: IV Treaties and Other Texts', *ZPE* 161: 67–100.
- Lanni, A. (2010), 'Judicial Review and the Athenian 'Constitution'', in Hansen, M. H. (ed.), *Démocratie athénienne - démocratie moderne : tradition et influences*. Genève: 217-35.
- Levinson, B. (2009), 'The Neo-Assyrian Origins of the Canon Formula in Deuteronomy 13:1', in D. A. Green and L. S. Lieber (eds.) *Scriptural Exegesis: The Shapes of Culture and the Religious Imagination. Essays in Honour of Michael Fishbane*, Oxford: 25-45.
- Lewis, D. M. (1997), *Selected Papers in Greek and Near Eastern History*. Ed. P.J. Rhodes. Cambridge.
- Loening, T. C. (1987), *The Reconciliation Agreement of 403/402 B.C. in Athens: Its Content and Application*. Stuttgart.
- MacDowell, D. M. (1962), *Andocides. On the Mysteries*, Oxford.
- MacDowell, D.M. (1975), 'Law-Making at Athens in the Fourth Century B.C.', *JHS* 95: 62-7.
- Manfredini, M. and Piccirilli, L. (1990), *La Vita di Solone*. 3rd ed. Milano.
- Matthaiou, A. (2011), *Τὰ ἐν τῇ στήλῃ γεγραμμένα*. Athens.

- Meyer, R. E., Sahlin, K., Ventresca, M. J., Walgenbach P. (eds.) (2009), *Institutions and Ideology. Research in the Sociology of Organizations*. Vol. 27.
- Mossé, C. (1979), 'Comment s'élabore un myth politique: Solon, 'père fondateur' de la démocratie athenienne', *Annales* 54: 425–437.
- Ostwald, M. (1969), *Nomos and the beginnings of the Athenian democracy*. Oxford.
- Ostwald, M. (1986), *From Popular Sovereignty to the Sovereignty of Law*. Berkeley and Los Angeles.
- Pasquino, P. (2005), 'Il potere diviso. Dalla *graphé paranomon* nella democrazia ateniese, a John Locke e James Madison', in *Conflitti*, Napoli: 89-99
- Pasquino, P. (2010), 'Democracy Ancient and Modern: Divided power', in M. H. Hansen (ed.). *Démocratie athénienne - démocratie moderne: tradition et influences*. Genève: 1-40.
- Piérart, M. (2000), 'Qui étaient les nomothètes à l'époque de Démosthène?', in Levy, E. (éd.). *La codification des lois dans l'antiquité*. Paris: 229-256.
- Pospisil, L. (1974), *The Anthropology of Laws: A Comparative Theory*. New Haven.
- Raz, J. (1977), 'The Rule of Law and It's Virtue', *The Law Quarterly Review* 93: 195-211.
- Quaß, F. (1971), *Nomos und Psephisma. Untersuchung zum griechischen Staatsrecht*. München.
- Rhodes, P. J. (1972), *The Athenian Boule*. Oxford.
- Rhodes, P. J. (1981), *A Commentary on the Aristotelian Athenaion Politeia*. Oxford.
- Rhodes, P. J. (1984), 'Nomothesia in Fourth-Century Athens', *CQ* 35: 55-60.
- Rhodes, P. J. (1987), 'Nomothesia in Classical Athens', in Giuliani A. - Picardi N. (eds.). *L'educazione giuridica*. Vol. 5/2. Perugia: 5-26.
- Rhodes, P. J. (1991), 'The Athenian Code of Laws, 410-399 B.C.', *JHS* 111: 87-100.

- Rhodes, P.J. (2003), 'Sessions of *Nomothetai* in Fourth-Century Athens', *CQ* 53: 124-129.
- Rhodes, P. J. (2006), 'The Reforms and Laws of Solon: An Optimistic View', in Blok – Lardinois (2006): 248-60.
- Rhodes, P. J. with Lewis, D. M. (1997), *The Decrees of the Greek City States*. Oxford.
- Robertson, N. (1990), 'The Laws of Athens, 410-399 BC: the Evidence for Review and Publication', *JHS* 110:43-75.
- de Romilly, J. (1971), *La loi dans la pensée grecque*, Paris.
- Rubinstein, Lene (2000), *Litigation and Cooperation. Supporting Speakers in the Courts of Classical Athens* (*Historia*. Einzelschriften; Bd. 147). Stuttgart.
- Ruschenbusch, E. (1966), *Solonos Nomoi. Die Fragmente des solonische Gesetzeswerkes mit einer Text- und Überlieferungsgeschichte*, Wiesbaden.
- Ryan, F. X. (2002), 'Die Zeugiten und das Archontat', *REA* 104: 5-9.
- Schiavone, A. (2012), *The Invention of Law in the West*. Cambridge, Ma.
- Schwartzberg, M. (2007), *Democracy and Legal Change*. Cambridge.
- Schmitz, W. (2004), *Nachbarschaft und Dorfgemeinschaft im archaischen und klassischen Griechenland*, Berlin.
- Sealey, R. (1982), 'On the Athenian concept of law', *CJ* 77, 289-302.
- Sealey, R. (1987), *The Athenian republic: Democracy or the rule of law?* Philadelphia -London.
- Shear, J. (2011), *Polis and Revolution: Responding to Oligarchy in Classical Athens*. Cambridge.

- Sickinger, J. (2008), 'Indeterminacy in Greek Law: Statutory Gaps and Conflicts', in Harris, E. M. and Thür, G. (eds.), *Symposion 2007: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*. Vienna 2008: 99-112.
- Sommerstein, A. H. (2014), 'The Authenticity of the Demophantus Decree', *CQ* 64: 49-57.
- B. S. Strauss (1991). 'On Aristotle's Critique of Athenian Democracy', in C. Lord and D. K. O'Connor (eds.). *Essays on the Foundations of Aristotelian Political Science*. Berkeley and Los Angeles: 212-33.
- Osborne, R. (2003). 'Changing the discourse', in K. A. Morgan (ed.). *Popular Tyranny: Sovereignty and its Discontents in Ancient Greece*. Austin, TX: 251-73.
- Stroud, R. S. (1968), *Drakon's Law on Homicide*. Berkeley and Los Angeles.
- Stroud, R. S. (1971), 'Greek Inscriptions: Theozotides and the Athenian Orphans', *Hesperia* 40: 280-301.
- Stroud, R. S. (1979), *The axones and kyrbeis of Drakon and Solon*, Berkeley.
- Stroud, R. S. (1998), *The Athenian Grain-Tax Law of 374/3 B.C. (Hesperia Supplement 29)*. Princeton.
- Surikov, I. E. (2012), 'Archonship in Athens: from the origin of the institution to the loss of its political significance', *Vestnik drevnej istorii* 2: 29-54.
- Themelis, P.G. (2002), 'Contribution to the Topography of the Sanctuary at Brauron', in B. Gentili - F. Perusino (eds.), *Le orse di Brauron*. Pisa: 103-116.
- Thomas, R. (1994), 'Law and Lawgiver in the Athenian Democracy', in R. Osborne and S. Hornblower (eds.). *Ritual, Finance, Politics: Athenian Democratic Accounts Presented to David Lewis*. Oxford: 119- 34.
- Todd, S. C. (1990), 'Lady Chatterley's lover and the Attic orators: the social composition of the Athenian jury', *JHS* 110: 146-73.

van Wees, H. (2013), *Ships and Silver Taxes and Tribute: A Fiscal History of Archaic Athens*. London.

Wolff, H. J. (1970), *Normenkontrolle' und Gesetzesbegriff in der athenischen Demokratie. Untersuchungen zur graphe paranomon* (Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Phil. Hist. Klasse 1969). Heidelberg.

Yunis, H. (1988), 'Law, politics, and the *graphe paranomon* in fourth-century Athens', *GRBS* 29: 361-82.